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CORRIGENDA.

In the list of Judges, as printed at the beginning of volume [illegible], read more the names of the Hon'ble Mr. Justice Pyari and the Hon'ble Mr. Justice Mukerji, in the place of Mr. Justice Daniels and some Ed.

At page 645 of Volume 49 (1927), header to, for "*Held* on second appeal that the suit was really instituted" *read* "*Held* on second appeal that the suit was properly decreed." At line the word "sent" in the last line *read* "appeal."

W. K. PORTER,
Law Reporter

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JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

1927

Chief Justice:

The Hon'ble SIR GRIMWOOD MEARS, Kt.

On deputation as Chief Justice

Acting Chief Justice:

The Hon'ble SIR CECIL WALSH, Kt

Judges:

The Hon'ble MR. JUSTICE BENJAMIN LINDSAY

The Hon'ble MR. JUSTICE SHAH MUHAMMAD SULAIMAN

The Hon'ble MR. JUSTICE BALOJI SADASHIV DALAL

The Hon'ble MR. JUSTICE LALTA PRASAD MUKERJI

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The Hon'ble MR. JUSTICE SUDHINDRA NATH SEN

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1957.

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[illegible] Mr. Justice Shaw. Muhammad Shahman (*died May*, 1957).

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APPELLATE CIVIL.

Before Mr. Justice Daniels and Mr. Justice King.

KASUMARI DAS (PLAINTIFF) *v.* MAKKHU AND OTHERS (DEFENDANTS).* 1926 May, 14

Act No. VII of 1889 (Succession Certificate Act), section 4—Suit for redemption by legal representative of deceased mortgagor—Succession certificate not produced until after passing of decree.

Where a succession certificate is necessary, it must be obtained at any rate before the court of first instance is ready to pronounce judgement. It has no retrospective effect, and therefore is of no avail to the plaintiff if it is obtained only when the suit in respect of which it is needed is in the stage of appeal. *Fateh Chand* v. *Muhammad Bakhsh* (1), followed.

THE facts of the case sufficiently appear from the judgement of the Court.

Munshi *Damodar Das*, for the appellant.

Munshi *Kailas Chandra Mital*, for the respondents.

DANIELS and KING, JJ.:—This is a second appeal in a suit for redemption brought by the legal representative of the deceased mortgagor, which suit has been

* Second Appeal No. 1558 of 1923, from a decree of M. F. P. Herchenroder, District Judge of Saharanpur, dated the 3rd of August, 1923, confirming a decree of Shambhu Nath Dube, Subordinate Judge of Deoria Dun, dated the 23rd of May, 1922.

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dismissed by both the courts below on the ground that up to the time when the decree was passed the plaintiff failed to obtain a succession certificate. The suit was brought without any succession certificate having been even applied for. Objection was taken and an issue framed whether the plaintiff could maintain the suit without obtaining the certificate. The trial court granted the plaintiff a fortnight within which to obtain the necessary certificate. He filed an application for a certificate in respect of half the debt, and this application was rejected. The trial court then dismissed the suit. The order rejecting the application for a certificate was taken in appeal to this Court and was held to have been properly passed. The learned Judges who decided the appeal allowed the plaintiff to apply for a fresh certificate on a proper application in respect of the whole debt. He did so apply and obtained a certificate which he filed in the appellate court. The learned District Judge has held that this certificate could not have retrospective effect and has supported his view by observations to this effect in the judgement of the Full Bench in *Fateh Chand* v. *Muhammad Bakhsh* (1). In that case also time was allowed to the party to obtain a certificate and he failed to obtain it within the time which was allowed. In the judgement of the Full Bench it is said that no subsequent production of the certificate could show that the decree of the Subordinate Judge was contrary to law. This observation applies exactly to the present case. It was held also in the Full Bench case that a succession certificate was necessary in respect of a mortgage-debt, and this point is not contested before us. The Subordinate Judge was, therefore, prohibited by section 4 of the Succession Certificate Act from passing any decree

(1) (1894) I.L.R., 16 All., 260.

in respect of the debt without the production of a succession certificate or one or other of the documents mentioned in clauses (i) to (v) of the section. The decree of the Subordinate Judge was, therefore, perfectly correct and the appeal to the court below was rightly dismissed. We dismiss this appeal with costs.

Appeal dismissed.

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Before Mr. Justice Walsh and Mr. Justice Pullan.

TAWASSUL HUSAIN (APPLICANT) *v.* ABRAR HUSAIN AND OTHERS (OPPOSITE PARTIES).*

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Act No. IV of 1912 (*Indian Lunacy Act*), *section* 62—*Insanity—Application for inquisition—Necessity of medical certificate to support application.*

A person who comes before a court with an application for an inquisition in insanity must support his application with a valid medical certificate of insanity. *Muhammad Yaqub* v. *Nazir Ahmad* (1), followed.

THE facts of the case sufficiently appear from the judgement of the Court.

Pandit *Madan Mohan Nath Raina*, for the appellant.

Dr. *M. L. Agarwala* and Mr. *Zafar Mehdi*, for the respondents.

WALSH and PULLAN, JJ. :—We consider that the chief difficulty which has arisen out of these proceedings is accounted for by the reluctance of the courts below to face the facts before them and give a definite decision. Musammat Izzat Fatma is an old Muhammadan widow, who in the year 1923 executed a

* First Appeal No. 269 of 1925, from an order of M. F. P. Herchenroder, District Judge of Cawnpore, dated the 4th of September, 1925.

(1) (1920) I.L.R., 42 All., 604.

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certain *waqfnama* and also a sale-deed. The applicant, who is her sister's son, then came before the court in Cawnpore with an application for an inquisition in insanity which was not supported by any affidavit or any medical certificate. The proceedings dragged on for a considerable time for one reason or another and finally the learned District Judge has come to the conclusion that the woman is not of unsound mind. It is true that this is not a very definite conclusion, but the reason for that is that the applicant did not produce any definite evidence. We have read a statement which this lady made to a Commissioner appointed by the court when she was admittedly living with the applicant. She stated that she was subject to fits of insanity and she denied all knowledge of any *waqfnama* or transfer of her property. It does not appear to us that these are the statements of an insane person. They were made with a very obvious motive, namely, to do exactly what the applicant wanted. It is not our experience that insane persons ever admit themselves to be insane, and we think that this lady, in view of her other intelligent remarks, was not really ignorant of the nature of a *waqfnama*.

As to her examination in court by the learned Judge, sitting in a *dooly* and wrapped up in a *burqa*, or her examination by the Civil Surgeon which appears to have been conducted under equally unsatisfactory conditions, we are certainly not of opinion that there is any proof that the lady was insane or incapable of managing her affairs.

We consider, moreover, that the applicant must have been aware of the judgement of this Court, *Muhammad Yaqub* v. *Nazir Ahmad* (1), in a case coming

(1) (1920) I.L.R., 42 All., 504.

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from this very district, in which it was definitely stated that applicants in cases of this kind should come to court fortified with a valid medical certificate of insanity. In Cawnpore there are always competent lady doctors and we cannot see why the applicant was unable to have this lady put under observation by a lady doctor who could have given a valuable opinion as to her mental state.

We do not, therefore, see our way to interfere with the finding of the lower court, but, having regard to the somewhat peculiar circumstances of this case, we consider that the parties should pay their own costs, and we also, in dismissing this appeal, do so without prejudice to any further application that the applicant may choose to make, supported by a certificate from a lady doctor, based on a sufficient period of observation.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

EMPEROR v. NIHAL AND OTHERS*

1926 June, 14.

Criminal Procedure Code, sections 55 and 112—Security for good behaviour—Order not setting forth the substance of the information received by the Magistrate—Illegality.

Merely setting out in a notice under section 112 of the Code of Criminal Procedure that a man is an habitual thief or robber and having the prosecution witnesses ready there and then to go on with the case is not the procedure contemplated by the law. In such cases where the Magistrate does not record the substance of the information received, this is more than an irregularity and will vitiate any subsequent order that may be passed. *Emperor* v. *Rajbansi* (1), followed.

*Criminal Revision No. 136 of 1926, from an order of H. Beatty, Additional Sessions Judge of Moradabad, dated the 22nd of February, 1926.

(1) (1926) I.L.R., 42 All., 646.

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THE facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgement of the Court.

Mr. *S. C. Goyle*, for the applicants.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

BANERJI, J. :—This is an application in revision by six persons named Nihal, Shama, Ghubbar, Mukhtar, Meda and Bhoja, who were bound over to be of good behaviour by a Magistrate of the first class of Bijnor. The procedure adopted in this case was this. On the 2nd of September, 1925, the Station Officer of Chandpur arrested under section 55 of the Code of Criminal Procedure a number of men. They were put up before a Magistrate on the 8th who directed a case to be registered and put up the next day. On the 9th of September the Magistrate first recorded an order purporting to be one under section 112 of the Code of Criminal Procedure, as follows :—

"Whereas it is brought to my notice that you the aforesaid are habitual thieves, burglars, cattle-lifters, and you associate with bad characters, you are hereby directed to show cause why you should not be directed to enter into a bond of Rs. 100 each with two sureties of Rs. 200 each to be of good behaviour for one year."

Thereafter the case began and sixteen witnesses for the prosecution were examined then and there. The accused, fourteen in number, it appears, were represented by a mukhtar. Even then it seems to me undesirable that, where persons are arrested under section 55 of the Code of Criminal Procedure they should not be told the substance of the information against them. As observed by Mr. Justice WALSH in the case of *Emperor* v. *Rajbansi* (1)—

"It is impossible to lay down any standard to which such notices (under section 112) are to conform, but when the

(1) (1920) I.L.R., 42 All., 646 (648).

Legislature provided that a Magistrate should make an order in writing setting forth the substance of the information received, it certainly meant a great deal more than telling a man that he was a suspected thief, because, however substantial that expression may be as an offensive description of an individual, it gives the person alleged to be that character not the slightest intimation as to what are the grounds upon which it is based. If that notice is sufficient, all that would be necessary would be to call upon anybody in India to show cause on the mere statement that he was suspected by the police to be an habitual thief, but the procedure clearly requires something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given information to the Magistrate."

It is, in my opinion, clear that merely setting out in a notice under section 112 of the Code of Criminal Procedure that a man is an habitual thief or robber, and having the prosecution witnesses ready there and then to go on with the case is not what the Legislature contemplated. However guilty a man may be, he is entitled, in my opinion, to a trial which is not a sham but a real trial, where the accused knows something about what is happening to him. I am, therefore, of opinion that the action of the Magistrate in not recording the substance of the information he had received does not amount to a mere irregularity which would be covered by section 537 of the Code of Criminal Procedure as argued by the learned Assistant Government Advocate. The learned Sessions Judge, no doubt, states that the notice was very vague, but he goes on to say that it was read and explained to the accused, and as there was a fuller police report on the record, which must have come to the notice of the accused or their mukhtar, he did not think there was any force in the argument adduced on behalf of the petitioners in the court below.

For these reasons I am of opinion that the order passed against the accused binding them over is bad

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in law. I set aside the order of the Magistrate binding over the six applicants, dated the 12th of October, 1925. If the district authorities are of opinion that action should be taken against them, proceedings must be taken according to law.

Order set aside.

FULL BENCH.

Before Mr. Justice Walsh, Mr. Justice Daniels and Mr. Justice Boys.

1926 June, 3, 15

RAM SAHAI SINGH (APPLICANT) v. DEBI DIN (OPPOSITE PARTY).*

Act (Local) No. II of 1903 (*Bundelkhand Alienation of Land Act*), *sections* 9 *and* 16—*Mortgage—Simple mortgage between members of same agricultural tribe—Validity of mortgage—Remedy of mortgagee.*

A simple mortgage of land to which the Bundelkhand Alienation of Land Act, 1903, applies is not illegal if made between members of the same agricultural tribe, although, by reason of section 16 of the Act the security cannot be sold.

So held by WALSH and DANIELS, JJ., BOYS, J., dissenting.

Bishnath v. *Bharosa* (1), *Jaswant Rao* v. *Kashinath Rao* (2) and *Bishnath Singh* v. *Basdeo Singh* (3), referred to.

THIS was a reference to the High Court under section 113 of the Code of Civil Procedure made by the Additional Subordinate Judge of Banda. The case was sent to a Bench of three Judges by order of the CHIEF JUSTICE. The facts of the case and the

* Civil Miscellaneous No. 297 of 1926.

(1) Miscellaneous Case No. 634 of 1925, decided on the 26th of November, 1925.

(2) (1926) A.I.R., All., 293; 96 Indian Cases, 208.

(3) (1925) I.L.R., 48 All., 67.

material questions arising for decision are set forth in the order of reference below —

In both of these cases the mortgagee was a member of the same agricultural tribe as the mortgagor, and in each case he waited until more than six years had elapsed before commencing his suit.

The learned Subordinate Judge has referred these cases to the court for its orders under order XLVI, rule 1, of the Code of Civil Procedure. Acting under section 9(3) of the Bundelkhand Alienation of Land Act, Act II of 1903, he sent the cases to the Collector, for him to exercise the power conferred by section 9 of the said Act The Collector called the Subordinate Judge's attention to a case No. 634 of 1925, *Bishnath Singh* v *Bharosa*, a copy of which is to be found on the record of this case. If that case was rightly decided, then it would appear that the plaintiffs in each of these cases, having lost their right to a personal decree, can obtain only a decree for sale, which for all practical purposes will be valueless to them by reason of the provisions of section 16 of the same Act. The view that was taken in the case No. 634 of 1925 was that whilst section 6 imposed certain contractual disabilities on members of agricultural tribes in relation to their dealings with outsiders, it did not in any way restrict their freedom of contract with regard to bargains amongst members of the same tribe or members of agricultural tribes in which the mortgagor and mortgagee were both residents of the district in which the land was situated. That is to say, a member of an agricultural tribe when borrowing money from a person whom we may for convenience sake term an outsider, could only borrow such money in accordance with the provisions of section 6.

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On the other hand it has been suggested that the Act wholly deprived the mortgagor of the power of borrowing money from any person whatever in any other form and manner than those set out in section 6 (*a*), (*b*), (*c*), (*d*). If the view in No. 634 of 1925 is decided to be correct, it may be that there is an omission in the Act, inasmuch as no provision is made whereby a mortgagee has any effective remedy if he sues more than six years from the date of the principal money becoming due and within twelve years of the bond. That, however, is not a question with which this Court has any concern, and if there is an omission that must be put right by subsequent legislation.

This case is transferred to a Full Bench for the purpose of deciding whether the construction placed upon the Act by the decision in No. 634 of 1925 was correct and for the Bench to return to the Subordinate Judge an answer which they conceive to be proper in the circumstances, thus finally disposing of each case. Attention may be drawn to the fact of the very high rate of interest exacted by the mortgagee in both these cases.

The applicant was not represented

Mr *A. Sanyal*, for the opposite party.

WALSH, J.:—The question referred to this Bench is really whether the decision of the CHIEF JUSTICE and Mr. Justice LINDSAY, in Miscellaneous Case No 634 of 1925, is right. The point of law, or rather of interpretation, arises under section 9 of the Bundelkhand Alienation of Land Act, 1903. In this case a suit has been brought by a mortgagee of an agricultural tribe against a mortgagor of the same tribe, that is to say, it is a mortgage which is not within the mischief prohibited by section 6. Section 6 forbids a mortgage by a member of an agricultural tribe where the mortgagee is not a member

of the same tribe, or where the mortgagor and mortgagee are not both members of agricultural tribes, unless it is in one of the forms prescribed by that section. Section 9(3) provides for the jurisdiction of the Collector in a case of a suit instituted in any civil court on a mortgage to which sub-section (1) of section 9 applies. Sub-section (1) of section 9 applies to a mortgage made after the commencement of the Act by a member of an agricultural tribe in any manner or form not permitted by or under the Act Section 6 and section 10 substantially contain all the matters which are not permitted under the Act. There is nothing in the Act which does not permit an ordinary simple mortgage. The enactment is a prohibitive one, and unless the matter about which the dispute arises can be shown to be within the prohibition, the prohibition does not apply.

In my judgement the matter is quite clear, and the view taken by the CHIEF JUSTICE and Mr. Justice LINDSAY was correct I would only add two observations. It is admitted that the policy of the Act is to keep out, what may be colloquially called, outsiders. The interpretation contended for by the plaintiff is, to my mind, inconsistent with the policy of the Act, and would be difficult to adopt even if there were language in the Act which justified that view. Sections 3, 6, 7, 11 and 15 all indicate that the plan of the Act was to control contracts of attempted alienation, which would have the effect of placing immovable property permanently in the hands of persons not members of the agricultural tribes. It seems to me that the decision with which I agree, is entirely in accordance with the general scheme of the Act.

The further observation which occurs to me is this. The CHIEF JUSTICE has already dealt with it

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in the referring order. By reason of the prohibition against the sale under section 16, which, as my brother DANIELS, J. pointed out during the argument, applies equally to simple money decrees, the security cannot be sold.

Further it appears that in this case the claim for a simple money debt is barred by statute. We have nothing whatever to do with that. We have only to interpret the language as we find it without regard to the consequences If there is, as the CHIEF JUSTICE suggests, a *casus omissus* in the provisions of the Act, and it is the deliberate policy of the Legislature that no sale should be permitted, the effect of which would be to put the property to auction, it seems to me, after considering the matter for what it is worth, that the difficulty can be got over and a remedy given to the mortgagee by providing for foreclosure in a case of a mortgage between two members of an agricultural tribe. This might receive the attention of Government. In my opinion the answer to the reference is in the affirmative, namely, that section 9 does not apply

DANIELS, J :—I concur in the view that section 9 of the Bundelkhand Alienation of Land Act, 1903, does not apply to a simple mortgage between members of the same agricultural tribe and in the reasonings of my brother WALSH, J The words " a mortgage in any manner or form not permitted by or under this Act " in section 9 can only refer to a mortgage which is contrary to and forbidden by the Act. The Act is not one permitting mortgages which would otherwise be illegal. It is a restrictive Act restricting in the case of members of an agricultural tribe the free right of contract which they would otherwise possess. Now sections 6 to 8 carefully restrict the mortgages which can be made by a member of an agricultural tribe in

favour of an outsider. They do not restrict the mortgages which he can make in favour of a member of the same tribe. Section 10 invalidates a stipulation by way of conditional sale whether in favour of a member of the tribe or of an outsider. There is nothing in the Act to forbid a mortgage such as that which we have to consider. Section 16 takes away the remedy of sale not only in the case of mortgage decrees but in the case of all decrees, and cannot be read as constituting the mortgage illegal. There is undoubtedly a hiatus in the Act which requires the attention of the Legislature, but our business is to interpret the Act as it stands.

I, therefore, agree in the answer proposed.

BOYS, J.—In this case the Additional Subordinate Judge of Banda has referred suit No. 88 of 1924 for the opinion of this Court under order XLVI.

The plaintiff sued on the basis of a simple mortgage deed executed after the Bundelkhand Alienation of Land Act, 1903, came into force. His right to a simple money decree was barred by limitation.

* * * * *

Two questions arise

(1) Is there ground *in the Act* for believing that the Legislature intended to include in the Act mortgages between members of the same tribe, and, as *on that basis* section 16 will be undoubtedly applicable to forbid a sale of the property under a decree or order of the civil court, has the Collector power under section 9(1) to re-model the mortgage so as to secure to the mortgagee his money?

(2) Is there ground *in the Act* for believing that the Legislature intended mortgages between members to be wholly outside

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the scope of the Act, and is the exclusion of such mortgages from the operative effect of section 16 a justifiable interpretation?

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The Legislature must have had one intention or the other and, as I conceive it, it is our duty to apply, *if there is any ambiguity*, one or the other of such interpretations as will carry out what at least must have been the certain intention of the Legislature, not to deprive violently the member-mortgagee of more, at any rate, of his rights than may be inevitable in securing the object of the Act, the protection of the improvident member-borrower.

That there is such ambiguity in the effect of the Act is beyond doubt, since the first of the two interpretations above set out has been acted on for twenty years, and by this Court, and a third has recently been given effect to in Miscellaneous Case No. 634 of 1925, and is, as I understand, approved by my brothers, Mr. Justice WALSH and Mr. Justice DANIELS.

As to the first question:—Section 6 specifies, first, certain parties to a mortgage and, next, certain forms of mortgage. It first lays down that it has no application to where both the parties are members of the same tribe nor to where both parties, being members of different tribes, live in the district where the land is situate.

Where the parties do not come within either of these categories, that is, where the mortgage is between a member and one who may be described as a stranger, "*the mortgage shall be made in one of the following forms.*"

The present mortgage is between members, and section 6 has, therefore, primarily and *standing by itself* no bearing on the present case, though, of course,

the whole or part of such section may have a bearing if such bearing is indicated by any other section.

Sections 7 and 8. Here we have certain conditions which are to attach, or may by agreement attach, when we have a mortgage made between a member and a stranger and made in one of the permitted forms. These two sections, therefore, appropriately begin by specifically stating that they concern "mortgages made under section 6."

Next comes section 9. Clause (1) gives the Collector power to re-model the terms of a mortgage, if three conditions exist—

(*a*) if it has been made after the commencement of the Act;

(*b*) if it has been made by "a member of an agricultural tribe," and

(*c*) if the mortgage is "in any manner or form not permitted by or under this Act."

It is contended for the defendant mortgagor and I understand it to be the view accepted by my brothers, Mr. Justice WALSH and Mr. Justice DANIELS, that the section only deals with mortgages which are made between parties who are controlled by section 6 and whose mortgages are required to be made in a particular form, that is to say, which are made between a member and an outsider, and does not govern mortgages which are made between members.

It is clear, of course, that it does govern mortgages between a member and an outsider if the mortgages are not in one of the forms required by section 6.

But is its scope limited to such mortgages only?

If it were so limited, why the striking change in language from that employed in section 7 and twice in section 8? Why did the section not begin:— *In*

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the case of mortgages governed by section 6 made after the commencement of the Act but not in one of the forms prescribed, the Collector etc." That is the phraseology which must naturally have suggested itself to any draftsman who had just drafted sections 7 and 8 and had them before him.

At the hearing I more than once invited any explanation of this striking change in phraseology. I heard none except the reference made by my brother Mr. Justice DANIELS to section 8(2) and section 10, and a suggestion that those sections also dealt with cases of mortgages in "forms not permitted by the Act" and might account for the omission of any specific mention of section 6. Section 8(2) is merely a corollary to the preceding provisions including those in section 6 which call for a particular form. To section 10 I will refer again presently; its existence seems to support the contrary proposition that section 9(1) includes mortgages between members. But for the present purpose I only note that it would have been equally easy to say "In the case of mortgages governed by section 6 or section 10" or "a mortgage contravening the provisions of section 6 or section 10" or "a mortgage forbidden by section 6 or section 10."

It might, of course, be that, whether or not an alternative phrasing was possible, that actually used equally limits the power of the Collector to re model ling mortgages governed by section 6 but not in one of the forms prescribed. But that does not appear to be the case.

First, the words "*a member of an agricultural tribe* makes a mortgage," while they, of course, include a mortgage by a member to an outsider, are equally inclusive of a mortgage by a member to a member.

This is consistent with the wider scope of the section, though it is not, of course, by itself conclusive.

Again, such ambiguity, if the phrase is ambiguous and not deliberately used to cover *all* mortgages by a member, would have been avoided by the use of the phrase to be expected,—"In the case of mortgages governed by section 6."

Next, the words "*in any manner or form not permitted by or under this Act.*" The logical and only way of determining the value of this phrase is to ask ourselves "what are the manners or forms permitted by or under this Act?" and to put "all other manners or forms" in the category of "not permitted by or under this Act." There is only one section which lays down "forms permitted by the Act," that is, section 6 (read, of course, with section 8), which says "the mortgage shall be made in one of the following forms"

The words "in any manner or form" clearly in themselves carry no reference whatever to "parties," but relate merely to the *form* of the mortgage, and, as I have noted, the previous words "a member of an agricultural tribe makes a mortgage" are clearly equally applicable whether the mortgagee is a member or an outsider

Both phrases, taken separately and taken together, indicate that only two conditions are required to make the section applicable to a mortgage made after the commencement of the Act, one that the mortgagor be a member and, secondly, that the mortgage be not in one of the forms covered by clauses (*a*) to (*d*) of section 6 read with section 8.

Finally, the action permitted to, not obligatory on, the Collector is in no way inconsistent with the view that the earlier part of the section includes in its

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scope a mortgage between members. If the parties, both members, have included in their mortgage any objectionable terms, including a condition that may involve a sale of the land, he can re-model it on the lines laid down so that the mortgagee be not injured unfairly, subject to the land being preserved.

I have mentioned above Mr. Justice DANIELS' reference to section 10 and that I would refer to it later.

It was suggested that section 10 was a case of a form of mortgage "not permitted" by the Act, that a mortgage containing a condition intended to operate by way of conditional sale is, as it stands, a mortgage "not permitted by the Act" because the condition is to be null and void; and that such a mortgage would come within section 9(1) and accounts for there being no opening specific reference to section 6. This, in fact, actually supports the contention that section 9(1) covers mortgages between members, for section 10 expressly refers to "*any mortgage*," and cannot possibly be held to be limited to mortgages between a member and a stranger, and if such mortgages as are referred to in section 10 are to be taken to be included within the scope of section 9(1), what force can there be left in the suggestion that section 9(1) deals only with mortgages between a member and a stranger?

In this view the broad intention of the Act appearing from its provisions was to require mortgages between a member and a stranger absolutely to be in a particular form, but that mortgages between members did not normally require such stringent restrictions, but even such mortgages might require control.

Section 9(1), therefore, gave the Collector discretionary power to re-model all mortgages made after the commencement of the Act and section 9(3) ordered the court to send all such mortgages to him.

There was no proper right to be gained for a member of a tribe by making a simple mortgage given by him to another member waste paper, so far as the security was concerned, by depriving the mortgagee not only of his right to bring to sale but of his right to that sort of security arising out of the land which was being allowed to strangers.

The above considerations indicate that there is much ground to justify a finding that mortgages between members can, as the section has been drafted, be re-modelled by the Collector under section 9(1).

If in fact it is not clear beyond doubt that the above is the correct interpretation of section 9(1), can it not at the very least be said that the effect of the section is open to doubt? And if that is so, ought we not to give to it that interpretation which will not inflict hardship on anybody, an interpretation which has not been questioned for twenty years (till the decision in Miscellaneous Case No. 634 of 1925) and more especially so where it may be that scores of persons have believed themselves to have entered into obligations and acquired rights on the faith of such interpretation evidenced by long and common practice.

Before turning to the second question I will make some observations on the two cases referred to by the Subordinate Judge, and also mention another case.

As to the case of *Jaswant Rao* v. *Kashi Nath Rao* (1), more cannot be said than that the jurisdiction of the Collector to deal with the case under section 9(1), and, therefore, of the civil court to send the case to him under section 9(3), was assumed to exist. As the learned Subordinate Judge remarks in this case, it had always for the past twenty years been understood to exist until the refusal by a

(1) 86 Indian Cases, 208; (1925), A.I.R., All., 253.

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Collector in 1925 led to the decision in Miscellaneous Case No. 634 of 1925. But in fact I do not find anything in the report of this case to suggest that the mortgagee was a member of an agricultural tribe. If he was not, the case has not even the slight bearing on this case that it would otherwise have.

In *Bishnath* v. *Bharosa* (1), the decree holder still had in fact left to him his right to a simple money decree, justice was secured for him and there was no serious hardship. It would seem that as there was in that case a means ready to hand for the plaintiff-mortgagee to secure his money there was no necessity for any real contention.

A case which does support the applicability of section 9(1), and which was not brought apparently to the notice of the learned Judges who decided Miscellaneous Case No. 634, doubtless because it had not then been reported, is *Bishnath Singh* v. *Basdeo Singh* (2), decided as recently as the 12th of June, 1925. Mr. Justice KANHAIYA LAL upheld both the findings of both the lower courts that there was no reason why a case of a simple mortgage between members after the passing of the Act should not be sent to the Collector, under section 9(3), for action under section 9(1) and even after a decree had been passed. In so holding this decision in a Letters Patent Appeal the Bench held that "*we find it impossible to hold that the civil court ceased to have jurisdiction to act under section* 9(3) as soon as a nominal decree was passed which cannot in fact be executed by sale."

I turn now to the second question. Is there ground *in the Act* for believing that the Legislature intended mortgages between members to be wholly outside the scope of the Act, and is the exclusion of

(1) Civil Revision No. 694 of 1925, decided on the 26th of November, 1925

(2) (1925) I.L.R., 48 All., 67.

such mortgages from the operative effect of section 16 a justifiable interpretation?

The only direct and unambiguous reference in the whole Act operating on alienation between members of the same tribe is section 3. There is another section, section 10, to which I have already referred, in which the expression "any mortgage" occurs, which is wide enough to include alienations between members, but there is no section which in specific terms refers to such alienations except section 3. That section enacts that a permanent alienation between members of the same tribe or where both parties are members of agricultural tribes and both residents of the district in which the land is situated is unrestricted. There is no section at all specifically declaring temporary alienations between such parties to be unrestricted, but much the same purpose may be said to be effected by inference by section 6. The specific provision in section 3(1) (*b*), read with section 3(1) (*a*), is apparently inserted only in order to prepare the ground for the next provision in section 3(2) beginning "Except in the cases provided for in sub-section (1)," etc.

These considerations indicate that there is good ground in the Act itself to justify a finding that the Act in no way deals with alienations, whether permanent or otherwise, between members of the same tribe.

If then, that conclusion is justified, it is, as I conceive it, our bounden duty to interpret section 16 as having no bearing on such temporary alienations, so ruling *not* on the ground that the Legislature did not mean to include such alienations, but because the Act taken as a whole indicates that such alienations are not within its scope and the Act must be given effect to as a whole.

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In my endeavour to interpret this Act I believe that I am guiding myself only by canons of interpretation that have been constantly approved.

ERLE, C. J., said in *Smurthwaite* v *Wilkins* (1) :—

Boys, J

"The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parliament"

JESSEL, M. R., said in *Taylor* v. *Corporation of Oldham* (2) :—

"Whatever I may think of the extraordinary results which are so caused, it is my duty to interpret Acts of Parliament as I find them. I must read them according to the ordinary rules of construction, that is, literally, *unless there is something in the context or in the subject* to prevent that reading."

Lord WENSLEYDALE said in *Becke* v. *Smith* (3) :—

"It is a very useful rule of construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, *unless that is at variance with the intention of the Legislature, to be collected from the statute itself*, * * * * in which case the language may be modified so as to avoid such inconvenience but no further"

Beal (p. 307) quoting Lord BLACKBURN in *River Wear Commissioners* v. *Adamson* (4) says: "The court must, in each case, apply the admitted rules of interpretation to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet *not adhering slavishly to them where to do so would obviously defeat the intention which may be collected from the whole statute*"

(1) (1862) 11 C B N.S., 842 at 848, 31 L J C P, 214 at 216.
(2) (1876) 4 Ch. Div., 395 at 405.
(3) (1828) 6 L.J., Ex, 54.
(4) (1876 7 ... App. Cases, 743 at 765 ... 193 ... 203.

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The second interpretation would give effect to the opinion that even though section 9(1) *can be* interpreted as covering mortgages between members, it is not the right interpretation of that section.

It is sufficiently obvious that both interpretations cannot represent exactly the intention of the Legislature. That they are to some extent dissimilar in effect is to be expected where the one is arrived at upon a strictly literal interpretation of the actual words and the other upon a consideration of the intention of the Legislature and the actual scope of the Act as evidenced by its provisions. The former, while it would not permit the mortgagee to bring the land to sale, would give him security for his money; the latter would give him all his normal rights including the right to bring to sale; but either interpretation would secure him from grave injustice. I may personally feel sure from sources outside the Act as to which is the correct interpretation, but I am bound to be guided by considerations founded upon the Act itself.

Boys, J.

Guided by the terms of the Act and finding interpretations which would not deprive the mortgagee in this case, and others in a similar situation, of his just rights, it would be my duty to give effect to one or the other of those interpretations. Had I to decide the matter I should be inclined, subject to any further argument that I might hear, to give preference to the second interpretation, if only on the ground that that interpretation, justifiable in itself, would mean no interference with the rights of the mortgagee, and he is entitled to claim that there should be no interference unless the law clearly limits his rights.

I do not overlook the fact that in the event of the mortgagee in this case bringing the land to sale it might pass into hands of a stranger not a member

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of an agricultural tribe, and that thus to hold that mortgages between members do not come within the scope of the Act at all means in effect to hold that there is one case which the Legislature has overlooked when attempting to prevent land passing to a stranger. But where it is admitted on all sides, and the circumstances under which this case has come before a Full Bench prove that the Act is defective in one respect or the other, I think that where a reasonable interpretation founded on the Act itself would save the mortgagee's just rights and only indicate that the Legislature had omitted by oversight to stop one channel by which land might get into the hands of a stranger, we ought to adopt that interpretation rather than adopt the view that the Legislature has by similar oversight done a positive and serious injustice.

Boys, J

The order of reference by the Division Bench requires us to say not only whether the construction placed upon the Act by the decision in Miscellaneous Case No 634 of 1925 was correct, but further "to return the Subordinate Judge an answer which they (the Full Bench) conceive to be proper in the circumstances, thus finally disposing of each case." The order of reference by the learned Subordinate Judge to this Court asked for a direction as to "what should be done" and asked this Court "to remove the doubt as to what should be the procedure which should be followed"

I would direct the trial court to proceed under the ordinary law applicable to a decree and, if necessary, to attachment and sale.

As I have the misfortune to differ from my learned brothers, this judgement is of no value, but it was incumbent on me to give my reasons for being regretfully compelled to differ and for holding that we are not compelled by the Act to deny the [redacted] remedy.

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BY THE COURT —The order of the Court is that section 9 of the Bundelkhand Alienation of Land Act, 1903, does not apply to the facts of the cases referred. Let the references be returned with this answer.

Reference answered.

Before Sir Cecil Walsh, Acting Chief Justice, Mr Justice Sulaiman, Mr. Justice Daniels, Mr. Justice Mukerji and Mr Justice Boys.

GIRJA NANDAN KALWAR (PLAINTIFF) *v* HANUMAN DAS MARWARI (DEFENDANT).*

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June, 25
July, 27
July, 28.

Act No. IV of 1882 *(Transfer of Property Act), section* 59—*Act No XXVI of* 1917 *[Transfer of Property (Validating) Act], section* 2—*Act No XXVII of* 1926 *[Transfer of Property (Amendment) Act], section* 2—*Interpretation of statutes—Criteria for determining whether Act has retrospective effect or not.*

Held (per SULAIMAN, DANIELS and BOYS, JJ., WALSH, A. C. J. and MUKERJI, J., dissenting) that the Transfer of Property (Amendment) Act, 1926, is not retrospective in its operation.

Attorney-General v. *Theobald* (1), *Nga Hoong* v. *The Queen* (2), *Gardner* v. *Lucas* (3), *Young* v. *Adams* (4), *Shamu Patter* v. *Abdul Kadir Ravuthan* (5), *Modern Railway Co.* v. *Pye* (6), *Muhammad Abdus Samad* v. *Qurban Husain* (7), *Gopal Pandey* v. *Parsotam Das* (8), *Pardo* v. *Bingham* (9), *Leeds and County Bank* v. *Walker* (10), *Naim-ul-Haq* v. *Muhammad Subhan Ullah* (11) and *Colonial Sugar Refining Company* v. *Irving* (12), referred to

One of the original witnesses to a mortgage-deed, executed nine years prior to the passing of the Transfer of Property (Amendment) Act, 1926, was present when the deed was

* Second Appeal No. 1500 of 1923, from a decree of Baijnath Das, District Judge of Ghazipur, dated the 19th of February, 1923, modifying a decree of C. Deb Benerji, Subordinate Judge of Gorakhpur, dated the 26th of November, 1922

(1) (1890) 24 Q.B.D., 557.
(2) (1877-78) 3 App. Cas., 582.
(3) (1912) I.L.R., 35 Mad., 607.
(4) (1903) I.L.R., 26 All., 119
(5) (1880) I.L.R. [redacted] 735.
(11) (1916) I.L.R. [redacted]
(12) (1857) 7 Moo. I.A., 72
(4) (1899) A.C., 469.
(6) (1861) 30 L.J.C.P., 313
(8) (1882) I.L.R., 5 All., 121
(10) (1883) 11 Q.B.D., 84
(12) (1905) A.C., 369

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executed, while the other put his signature to the document on receiving a personal acknowledgement from the executant. *Held*, that the mortgage was invalid, inasmuch as it was not duly attested as required by the ruling in *Shamu Patter* v. *Abdul Kadir* (1), and, therefore, a suit based on it must fail.

THIS was a suit for sale on the basis of a mortgage-deed, dated the 3rd of April, 1917, and presented for registration on the 24th of April, 1917. The suit was contested mainly by defendant No. 2 who held a mortgage, dated the 8th of April, 1917, and presented for registration on the 11th of April, 1917. The defendant pleaded that the plaintiff's mortgage-deed had been antedated and was in fact subsequent to the defendant's mortgage. This point was found against the defendant. He further denied the completion and validity of the document. The court of first instance decreed the claim. On appeal the learned District Judge held that the plaintiff's mortgage-deed was defective for want of proper attestation. He held that it was executed in the presence of only one witness Baldeo at one place and then it was brought to the court compound where it was attested by the second witness Kamla. Kamla was dead and could not be produced, but Baldeo was examined. The learned Judge was of opinion that even if Kamla had signed the document on the acknowledgement of the mortgagor, there was no proper attestation in law and the document created no charge on the property. He accordingly allowed the appeal by the contesting defendant and gave the plaintiff a mere simple money decree against the mortgagor.

The plaintiff came up in appeal to the High Court. The Bench before which the appeal was first laid came to the conclusion that the trial of the suit by the first court had been unsatisfactory and that, inasmuch as

(1) (1912) I.L.R., 35

the pleas taken by the defendants were not quite express and clear, there was a possibility of the plaintiff having been prejudiced. This Court accordingly, on the 23rd of March, 1926, sent down an issue whether or not the statutory provisions with regard to attestation had been duly complied with. Parties were given the opportunity to produce additional evidence if they chose. The finding returned by the District Judge on this issue was that Baldeo actually saw the executant sign the document, and attested it at one place; and later on at another place Kamla, the second witness, received an acknowledgement of the execution by the executant and then signed it.

The Bench (SULAIMAN and BOYS, JJ.) then referred the questions of law raised by the appeal to a Full Bench

The reference was then argued before a Bench of five Judges.

Munshi *Harihans Sahai*, for the appellant.

Munshi *Shiva Prasad Sinha*, for the respondent.

WALSH, A. C. J.:—I am unfortunately unable to agree with the view taken by the majority of the Court in this case. The question referred is whether Act XXVII of 1926 applies to documents prior to the Act coming into force. A secondary question arises whether it applies in the hearing of an appeal from a decree passed before the Act.

In my opinion the questions permit of only one answer. The preamble to the Act says it is expedient to explain certain provisions of the Transfer of Property Act, 1882. It enacts that in section 3 of that Act, after the definition of the word "instrument" the following shall be inserted, namely, "'attested' in relation to an instrument means" and then follows the interpretation to be put upon the word "attest."

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Walsh, A C J

I read this to be statutory instruction to everybody who is bound by the statute and to the courts, to interpret the word "attested" in the sense provided whenever it has to be interpreted. The Act came into force on the 25th of March, 1926, and from that date every court was bound by the statute whenever it has to consider the meaning of the word "attested" in relation to any instrument to which the Act applies. There is no language qualifying or limiting the instrument to which the Act applies. If it was intended to limit it, it was necessary to do it by express language having regard to the generality of the language which I have quoted.

It is clear that if a certain view of the law is changed by the decision of a superior authority, for example, if any decision of the Allahabad High Court is overruled in the Privy Council pending an appeal in another case, the Allahabad High Court would have to apply the changed view in obedience to the authority of the Privy Council in spite of the fact that the decision of the lower court was right when it was given in following the old decision. It seems to me incongruous that an appellate court should be bound to effect this result whatever the consequence to the parties in the case of a decision given for the first time by a superior authority and should hold itself not so bound in the case of a statutory definition given for the first time by the legislation. With all respect I regard the considerations set out in the referring order as beside the question, having regard to the plain language and simple direction contained in the Act now under consideration.

The case seems to me to be analogous to that decided by the Divisional Court in England in *Attorney-General* v. *Theobald* [illegible]. In that case there

was previous legislation imposing stamp duty upon personal property passing under a voluntary settlement. A subsequent Act enacted that the expression "voluntary settlement" should be construed in a particular way. It was held that the earlier Act must be read as having the meaning declared by the later Act. The duty imposed upon the court by the statute must be discharged from the moment when the statute becomes law, without reference to the date of the instrument Where the meaning is plain we have nothing to do with the consequence

SULAIMAN, J. :—The arguments for and against the view that Act XXVII of 1926 is retrospective in its nature are set forth at some length in the order of reference * It is, therefore, unnecessary for me to repeat them in detail.

The strong point in favour of the plaintiff appellant is that the preamble of the Act contains the expression "to explain certain provisions of the Transfer of Property Act, 1882," and section 2 of the Act defines what the word "attested" means. The preamble standing by itself undoubtedly gives an indication that nothing new was being enacted but only the meaning was being explained. But the preamble is merely a key to the construction of a statute and it cannot control its substantive provisions, which may be found to extend beyond the limits of the preamble—*Nga Hoong* v. *The Queen* (1). The law requiring how a document is to be completed is not a mere rule of procedure but a substantive provision *Gardner* v. *Lucas* (2). Without proper attestation no charge on immovable property is at all created. If the Act of 1926 is to be held retrospective in its operation, so as to take effect from 1882, vested rights would be affected throughout India.

* It was not thought necessary to over-burden the report with this order which sets out the facts but is no part of the judgement of the Court

(1) (1857) 7 Mr (2) (1877-78) 3 App. Cas. 582

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There is, therefore, a very strong presumption against its retrospective nature unless the language employed is "plain and unambiguous." The form of an Act is by no means conclusive. An enactment may be declaratory in form but may not be retrospective in its operation—*Young* v. *Adams* (1).

Sulaiman, J.

The Act is called the Transfer of Property (Amendment) Act and did not come into force with effect from the date when it was passed, but, like many other Acts, from the date when it received the assent of the Governor-General. It does not expressly say that it will be retrospective and will apply to all previous transactions. Section 2 does not merely declare what has always been the meaning of the word "attested" but an elaborate definition is to be inserted in section 3 of the Transfer of Property Act. That definition certainly goes much further than the ordinary meaning of "attested" as given by their Lordships of the Privy Council in *Shamu Patter* v. *Abdul Kadir Ravuthan* (2). After the pronouncement of the highest tribunal, it could hardly be said that any doubt remained as to its meaning requiring an explanation. No such doubt could certainly remain after the Legislature itself, by the enactment of Act XXVI of 1917, recognized the correctness of their Lordships' ruling and found it necessary to validate transfers prior to 1915 in these provinces, leaving the law intact in the other provinces and for the subsequent period. If, in the opinion of the Legislature, their Lordships had committed a judicial error all that was necessary was to rectify that error and not to validate certain specified transfers only.

If the word "explain" were not in the preamble, every one would probably have agreed that the Act was only prospective. If the Act of 1917 were not in the

(1) (1898) A.C., 469. (2) Mad., 607.

way, I would certainly have held the new Act to be retrospective. One course is to ignore altogether the effect of the Act of 1917 and attach so much weight to the preamble of the new Act as to make it conclusive and to govern absolutely its substantive provisions The other course is to admit that the Legislature itself in 1917 accepted the law as laid down by their Lordships to be correct, and then to hold that the Act in reality alters that law, and, therefore, goes beyond the preamble, in which case it cannot be retrospective.

The point itself is a difficult one and the difficulty is enhanced all the more by reason of a difference of opinion On the whole, I agree with my learned brothers DANIELS and BOYS, JJ in answering the first question in the negative

DANIELS, J. :—The questions referred for the decision of the Full Bench are—

(1) Whether Act XXVII of 1926 is retrospective in its nature so as to apply to documents executed prior to its coming into force?

(2) If so, whether it would also affect litigants in pending actions who have obtained a decree by a subordinate court before the passing of the Act, but the decree is still under appeal.

The second question only arises in the event of the first question being answered in the affirmative.

Act XXVII of 1926 came into force under the provision of section 5 of the General Clauses Act, 1897, on the 25th of March, 1926, on which date it received the assent of the Governor-General The document in suit was executed on the 3rd of April, 1917, nearly nine years earlier. It was a mortgage deed requiring attestation by [illegible]esses to give it validity under

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the provisions of section 59 of the Transfer of Property Act. It has been found that only one of the attesting witnesses saw the executant put his mark to the deed. The other attested it on an acknowledgement by the executant of the deed of his having executed it. Both witnesses attested the deed in presence of the executant. If Act XXVII of 1926 applies to the deed, this was a valid attestation. Under the law in force at the time, as laid down by the Privy Council in *Shamu Patter* v. *Abdul Kadir Ravuthan* (1) it was not a valid attestation

Daniels, J.

The first question turns on whether Act XXVII of 1926 is a purely declaratory Act or not. If an Act is purely declaratory, that is to say, if it enacts nothing new but merely explains the existing law, the ordinary rule of construction is that it applies equally to transactions prior to and subsequent to its coming into force —*Attorney-General* v. *Theobald* (2). It is, however, necessary to look at the substance and not merely at the form. An Act may be in form an amending Act and yet when its operative provisions are examined it may turn out to be merely explanatory. That was the case in *Attorney-General* v. *Theobald* (2). On the other hand an Act may be merely declaratory in form and yet may make a definite change in the law. The Musalman Waqf Validating Act of 1913 was an Act of this kind. The preamble recites that it has been enacted in order to remove doubts which have arisen regarding the validity of certain waqfs created by Musalmans. Yet the Act has been held not only by this Court, but also by the Privy Council to be prospective and not retrospective in its operation. Such an Act comes under the ordinary rule that an Act is not retrospective in its operation unless an intention to make it so clearly appears on its face. The rule does

(1) (1912) I L R., 35 Mad., 607 (2) (1[illegible] 2 B.D., 557

not apply to its full extent to matters of mere procedure, but where a statute affects vested interests it is not to be construed retrospectively except where no other construction is admissible *Gardner* v. *Lucas* (1) and *Young* v *Adams* (2). It is unnecessary to labour the point that the Act of 1926, if retrospective, does affect vested rights to a very serious extent. Rights in property have grown up all over India on the basis of the definition of attestation laid down by the Privy Council in *Shamu Patter's* case (3) and accepted by the Legislature in Act No XXVI of 1917 which will be unsettled and, in many cases, destroyed if Act XXVII of 1926 is held to apply to them.

The present is exactly the contrary case to that which came before the courts in *Attorney-General* v *Theobald* (4) In that case the Act to be construed was amending in form but declaratory in substance. In the present case the Act is declaratory in form but amending in substance If nothing had occurred beyond the decision of the Privy Council in *Shamu Patter's* case (3) it might be said that the Legislature intended to declare that decision to be incorrect The matter did not, however, rest there. The Indian Legislature by Act XXVI of 1917 accepted and embodied in an Act of the Legislature the interpretation put by the Privy Council on the word "attest" The Act in question is described as the Transfer of Property (Validating) Act, 1917. It applied only to the United Provinces of Agra and Oudh, and only to those instruments executed prior to the 1st of January, 1915 Within this limited area and this limited period of time it allowed validity to documents attested by persons who did not see the executant sign them, provided the attesting witness had received an acknowledgement of execution

(1) (1877-78) 3 App. Cas. 582 (2) (1893) A.C. 369
(3) (1912) I.L.R. [illegible] (4) (1890) 24 Q.B.D. 557

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Daniels, J.

from the executant It follows necessarily from this enactment, on the principle of *inclusio unius est exclusio alterius*, that in all other parts of India and for all documents executed after the 1st of January, 1915, no attestation was valid unless both the attesting witnesses had seen the executant sign the deed. This law has now been changed by the recent Act. It does not matter that the preamble declares an intention of explaining the law or that the change is made by the insertion of a new definition. The preamble may be used to gather the intention of the Act in doubtful cases but it can under no circumstances control the substantive provisions of the Act. If we find, as we find here, that the Act lays down a new provision inconsistent not merely with the interpretation placed on the word "attest" by the court, but with the interpretation accepted by the Legislature itself in Act No. XXVI of 1917, we are bound to hold and we do hold that it is not merely a declaratory Act but effects a change in the substantive law, and as there is nothing in the Act from which an intention to make it retrospective can be clearly inferred, it must be treated as applying only to instruments executed after its commencement

Where the Legislature inserts a new definition in an existing Act the effect of which is to define a term previously undefined, it would ordinarily be held that the definition was intended to be retrospective, more particularly when the preamble of the Act inserting it declared that it was expedient to explain the law, but where the new definition has the effect of repealing a previously existing and inconsistent definition, then, in the absence of clear words showing the contrary intention, the new definition will apply only from the date on which the new Act came into force and all documents executed prior to that date will be governed by

the definition then in force. This is substantially the position here. The Act of 1917 did not in terms define the word "attest" but it enacted expressly that for documents executed in the United Provinces prior to 1915 the word "attest" did not require that both attesting witnesses should have seen the executant sign, and by necessary implication that in all other parts of India and for all subsequent documents it was necessary that they should have done so. The definition so enacted has now been substantially modified, and as the Legislature has not declared that the modification shall be retrospective, the ordinary rule applies that the new definition governs only documents executed after it came into force

My answer to the first question, therefore, is that Act XXVII of 1926 is not retrospective so as to apply to documents executed prior to its coming into force

In view of this answer the second question does not arise

MUKERJI, J. :—This is a reference to a Full Bench by two learned Judges of this Court for its decision on two questions to be stated presently. As usual, the reference to a Full Bench has been due to a difference of opinion between the learned Judges who make the reference and two other learned Judges who decided the second appeal No. 693 of 1923 on the 1st of June 1926. One of the questions referred to the Full Bench is a rather difficult one. It is a matter of pure accident that while both the learned Judges who made the reference are on the Full Bench and are in a position to represent their views, none of the Judges who decided the second appeal No. 693 of 1923 are here to represent their views of the case. I, therefore, sought an opportunity of consulting one of the learned Judges who decided the aforesaid second appeal

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Mukerji, J

The facts which led up to the reference are very briefly these. The appellant before this Court instituted the suit out of which this appeal has arisen on foot of a mortgage-bond, dated the 3rd of April, 1917. The suit was contested principally by a second mortgagee who holds a mortgage, dated the 8th of April, 1917. The main point of contention was that the plaintiff's mortgage was not a valid mortgage under section 59 of the Transfer of Property Act, inasmuch as both the attesting witnesses to it did not see the executant sign his name on the bond. It has been found that while one of the marginal witnesses saw the execution, the other put his signature on the document on receiving a personal acknowledgement from the executant of the execution. It is contended for the second mortgagee that in the circumstances of the case the mortgage of the 3rd of April, 1917, is not a valid mortgage.

The learned Judges who decided the second appeal No 693 of 1923 were of opinion that the amendment of the Transfer of Property Act made by Act XXVII of 1926 would validate the mortgage in question although the Act was passed nine years after the execution of the mortgage-deed. The learned Judges who made the reference were inclined to disagree with this view and hence this reference. Of course the two learned Judges making the reference did not definitely commit themselves to the view they expressed in the order of reference and it cannot be said that there is, actually, at this moment a difference of opinion in the High Court.

The questions referred to the Full Bench are—

(1) Whether Act XXVII of 1926 is retrospective in its nature so as to apply to documents executed prior to its coming into force?

(2) If so whether it would also affect litigants in pending actions who have obtained a decree by a subordinate court before the passing of the Act but the decree is still under appeal

Point No. 1.—The Transfer of Property Act did not originally contain any definition of the word "attested" although it required that a deed of mortgage and a deed of gift should be attested by at least two witnesses. For want of a definition of the word "attested" there arose a difference of opinion among the High Courts in India as to its meaning. Except the Allahabad High Court, all other High Courts held that "attested" meant that the two witnesses required to "attest" should be present when the executant signed the document and should, therefore, see him actually sign it. The difference of opinion was set at rest when the Privy Council decided in view of the majority of the High Courts. As the opinion of the Allahabad High Court had been entertained for a long time and as it was feared that many transactions had been entered into on faith of the view expressed in Allahabad, Act No. XXVI of 1917 was passed to validate such of the documents as might have been executed prior to the 1st of January, 1915, in the United Provinces of Agra and Oudh. It was then that the Legislature in a way signified its approval of the interpretation put by the Privy Council on the word "attested."

Mukerji,

Then came the Act XXVII of 1926, passed ostensibly with a view to explain what was meant by the word "attested" as used in the Transfer of Property Act.

The question that arises is whether this definition should have effect from the date the Act XXVII of 1926 received the assent of the Governor-General, viz.,

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the 25th of March, 1926, or whether it should be read as having a retrospective effect.

It is clear that the mere form in which an Act is passed is not conclusive as to whether its application is to be in the future or it has a retrospective effect. On the other hand, it is also recognized that ordinarily a declaratory Act is supposed to have a retrospective effect unless the contrary intention is clearly [illegible] in the body of the Act. The preamble, therefore, is only a guide to the intention of the Legislature but it is not an infallible guide. The preamble in this case states that the Legislature thought it expedient to explain what was meant by the word "attested" as used in the Transfer of Property Act. When you attempt to explain a certain word already used by the Legislature in an enactment you assume that the meaning which you are going to put always existed there and that you are doing nothing to alter the meaning borne by the word. The preamble, therefore, on the face of it professes only to tell us what the word "attested" meant *since the passing of the Act* in 1882. Coupled with this avowed intention of the Legislature to do nothing but to explain the meaning of an already existing word there comes the definition of the word attested. In defining the word, the Legislature desires that the definition should be simply "inserted" in the Act. The effect would be as if the Act had all along contained the definition since its promulgation. This "insertion" of the definition would again point to the view that the Legislature meant only to "explain" the meaning of the word "attested" and did not profess to express the intention that the meaning was to be attached only to documents executed after the Act came into force and not to those that were executed before that. Further, let us examine the definition itself. It runs as f[illegible] "Attested in

Mukerji, J.

relation to an instrument means attested, etc The use of the word "means" again in my opinion indicates that the Legislature tells us that it wishes the word "attested" to bear a certain meaning without any reference to the date of the passing of the Act of 1926. When you say that a particular word already used by a Legislature means something you intend to say that that is the meaning which the word has always borne and should be interpreted as if the meaning attached to the word since the time of its first use (in 1882). Such being, therefore, the grammatical construction of the several words used in the enactment of 1926, it seems to me clear that the Act is a purely declaratory one and has a retrospective effect

Mulerji,

On the other hand, it has been said that from the words "expedient to explain" it cannot be inferred that the Legislature really meant to say that they themselves believe that the word "attested" has always borne the meaning which the Legislature wanted it to bear by enacting Act XXVII of 1926 I recognize the full validity of this argument. I have already indicated that by passing Act XXVI of 1917 the Legislature of the time accepted the interpretation put by the Privy Council on the word "attested" and having done so thought it was necessary to validate such documents as may have been executed on faith of a different interpretation But it seems to me to be equally clear that the Legislature not only wanted that the interpretation as adopted by the Privy Council should be changed but also that it should change with effect from the date of the passing of the Transfer of Property Act The words "whereas it is expedient to explain" were adopted not by way of telling a falsehood to the public at large, but simply because those words were calculated by use of as few words as possible to [redacted] the purpose which the Legislature

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Mukerji, J

had in view. An enactment never contains a discussion of the reasons as to why it was passed. Sometimes it is necessary to say a few words by way of an introduction to express the intention of the Act and that is why the "preamble" becomes necessary. The Legislature did not owe any explanation to anybody as to why they were altering the law. They thought it was enough to use words which would indicate their intention. If the words used clearly indicate the intention, I think it is beyond the province of the courts to scrutinize the motive. I fully recognize that the interpretation of the word "attested" had been definitely settled by the Legislature of 1917 in a particular way. It is also clear that in 1926 the Legislature wanted to widen the interpretation and to include certain methods of attestation which were not previously recognized. In other words, the Legislature did mean to alter the law. The only question is whether they meant to alter it for the future or whether they meant to alter it also with a view to affect the documents already executed before the 25th of March, 1926. The intention of the Legislature is to be gathered usually not from the history of past legislation but from the language employed in the Act itself and from that alone, where that intention is clear.

In the view I take of the language used in Act XXVII of 1926 no room is left in my mind to doubt that the Legislature meant to give the Act a retrospective effect. I have already stated that if the meaning of the Legislature be clear it is not open to courts to examine the previous law or the past history of it in order to find out the meaning of the words used. In my opinion it is clear that the Legislature meant by using words of that implication that the Act should have a retrospectiv[redacted] it is not,

therefore, necessary to pry into the reasons for this enactment. But it is not at all difficult to see why the Act should have been given a retrospective effect. In a country like India where the number of illiterate people exceeds 90 per cent. an enactment like sections 59 and 123 of the Transfer of Property Act is always a source of distress People are not accustomed to technicalities like the attestation of a document and it was believed that in spite of the fact that the word "attested" had been interpreted in a particular way for the last 44 years, hardships were still caused by that interpretation. The object, therefore, was to widen the sense of the word "attested" without impairing, to any great extent, the usefulness of the rule laid down in sections 59 and 123 of the Act. It is true that the giving of the retrospective effect was likely to affect some subsequent transferees by depriving them of such advantage as they might secure by establishing it in a court of law that a document having priority in date was not a properly drawn up one But such advantages could hardly be called "fair" advantages. For example, in this very case the plaintiff's mortgage was executed for consideration and in good faith The subsequent mortgagee wants to take advantage of the fact that there is a technical flaw. If, by the passing of the Act of 1926, such advantage is denied to the subsequent mortgagee nobody need be sorry for that. It has been hinted that the definition of the word "attested" not only widens the previous law but also alters it in a material way. I do not think that it has any such effect In my opinion all the documents that may have been executed strictly in accordance with the interpretation of the word "attested" as given to the word by the Privy Council will continue to be valid under the present [illegible] they will not be affected The words in [illegible] and each of whom has signed

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the instrument in the presence of the executant " do not necessarily mean that the executant should see the witnesses sign. If a pardanashin lady signs a mortgage by way of executing it in the presence of two witnesses and if the witnesses then and there sign the document by way of attestation, the mortgage will be good enough within the definition of the word " attested," because the witnesses have signed in the presence of the executant though it may be that they have not signed in the view of her.

For reasons given above I am of opinion that the answer to both the questions referred to us should be given in the affirmative.

BOYS, J.:—The main question and, in view of the opinion at which I have arrived, the only question is whether Act XXVII of 1926 is retrospective.

* * * * *

While it is accepted that each Act must be judged by its own language and surrounding circumstances, there are certain broad principles to which I shall refer. Before, however, mentioning those, I note that there are two outstanding features about this short Act: Firstly, that the preamble states that in the opinion of the Legislature it was " expedient " to " explain " certain provisions of the Transfer of Property Act, 1882. Secondly, " it is hereby enacted as follows " and then follows the insertion of a definition. That definition is to be " inserted " in the Act of 1882 after the definition of the word " instrument." I am unable to attach any particular weight to the word " inserted." This is a word equally applicable to an Act intended to be retrospective or to an Act which may be in accordance with ordinary presumption assumed to be prospective. Every amending Act contains the expressions " shall be inserted " or " shall be

added "; sometimes the one and sometimes the other phrase is used, appropriately to the nature of the alteration.

Similarly I am unable to attach any particular force to the word "means." It is equally used in all kinds of Acts in reference to definitions; whether those definitions are in an original or in an amending Act, it is just the ordinary word appropriate to a definition.

Nor am I able to attach any weight to the words "any instrument." They are capable, standing by themselves, of including any instrument executed in the past as well as those to be executed in the future or of being confined to instruments executed in the past, or of being confined to instruments executed in the future, according to the context and the nature of the Act. To assume that those words have any one or other of these three meanings appears to me to assume the answer to the question which we have to decide and to deny effect wholly to all the approved broad principles of interpretation of statutes.

Judging then the operative clause of the Act by itself and as it stands, I can find nothing to differentiate it from any similar clause that might be found in any Act appearing on the Statute Book for the first time.

Regarding the Act as a whole, the single feature which suggests that the Act is retrospective and the only fact which has given rise to doubt is to be found in the existence in the preamble of the words "to explain." In reference to this two generally accepted propositions may be stated: Firstly, the preamble can only affect interpretation of an operative clause where that operative clause is *in itself* of doubtful import. Secondly, the form of an Act is not conclusive in determining the question we have to decide. This point has been dealt with by my brother DANIELS, with whose expression

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of his views I entirely concur. I would add here some comments on the case with which he deals, *Attorney-General* v. *Theobald* (1) In that case POLLOCK, B. after pointing out that "each case must, however, depend upon the language of the particular statute and to some extent on the subject-matter to which the statute applies ", added " these words ' voluntary settlement ' *having given rise to doubts* the Legislature passed an Act, etc." I shall note later on that at the time of passing the Act XXVII of 1926 there were no doubts of any sort whatever existing in the mind of anybody as to what the current authoritative interpretation of the law then was These considerations together with those adverted to by my brother Mr. Justice DAVIES suggest to my mind that this case is not an authority for the proposition that the Act we are considering is not retrospective, but rather the converse.

It was suggested during the course of the argument that we are as much bound by a declaration of the Legislature affecting past transactions as we are bound by a judgement in regard to such transactions of their Lordships of the Privy Council That is, of course, a proposition beyond dispute but it again appears to me to assume the answer to the very question which we have to decide. If the Statute is retrospective there can be no question but that we are bound to give effect to it. But we have to determine this very question whether it is or it is not retrospective. Herein lies a difference between Statutes and the judgements of a superior tribunal. The latter are *never* confined to declaring what the law is to be in the future. The effect is always to declare what the law now is and has been in the past; in other words, such judgements are always declaratory and retrospective as well as [illegible]tive.

(1) (1890) 24 Q B [illegible]

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It would seem to be clear that none of the general tests which have been accepted in aid of the determination of the question whether an Act is retrospective or not is by itself conclusive. But that does not mean, of course, that such tests are of no value, and I will proceed to refer to some of them.

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That the form of an Act is not conclusive is clear not only from the case already referred to, *Attorney-General* v. *Theobald*, and other cases, but was very specifically asserted in *Young* v *Adams* (1) where Lord WATSON said: "It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are, therefore, retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law."

It is conceded on all sides that the initial presumption is that an Act is not retrospective. In *Modern Railway Company* v. *Pye* (2) EARLE, C. J., said: "Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation unless the intention of the Legislature that it should be so construed is expressed in *clear, plain and unambiguous language*." It is unnecessary to multiply authority for this proposition, but it may be noted that it was applied by their Lordships of the Privy Council, to whose authority we are particularly subject, in *Muhammad Abdus Samad* v. *Qurban Husain* (3) where they said: "It is not, however, in accordance with sound principles of interpreting Statutes to give them a retrospective effect." The only legitimate inference is that, if an Act is not clearly retrospective, if there is any doubt upon the point, the intention of

(1) (1868) A.C., [redacted]

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the Legislature must be taken to have been that it should not be retrospective.

As to what is a declaratory Act, the only definition that I have been able to find is in the most recent authority on the interpretation of statute law, Craies' "Treatise on Statute Law," 3rd edition, 1922, at page 60. "For modern purposes a declaratory Act may be defined as an Act passed to remove doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective." Without suggesting that no Act can be retrospective unless it comes within this definition, it is at least worthy of note that in the present case if there is one thing more clear than another it is that there could have been no doubts whatever in the mind of the Legislature when it passed Act XXVII of 1926 as to what the then existing law was and that the law had been universally understood in the same sense for the previous nine years. It is unnecessary for me to deal in detail with the previous history of this matter. It is set out in full in the referring order of Mr. Justice SULAIMAN and myself and mention of it is to be found in the judgement of my brother Mr. Justice DAVIES. By Act XXVI of 1917 the Legislature made it apparent beyond all doubt that it accepted the view of the law laid down by their Lordships of the Privy Council and from that date onwards that was the unquestioned law.

It is, however, necessary in this connection to note a suggestion which was made during the argument but which was then not further pressed. It was hinted that it is not open to us to consider the previous history of the matter. It may be conceded at once that it is not open to us to take into consideration the statements of objects and [redacted] the report

of the Select Committee or the proceedings in Council prefatory to an Act becoming law, but there is a great distinction between such proceedings and the previous state of the law itself and the prior Acts of the Legislature. It is the universal practice when interpreting a new Act, any clause of which gives rise to any difficulty, to consider the Act whose place it takes, and I am not aware that the correctness of this practice has ever been challenged. As long ago as 1882 in *Gopal Pandey* v *Parsotam Das* (1) Mr. Justice MAHMOOD, after excluding from consideration the statements of objects and reasons, etc., said: "We are no doubt at liberty to consider *the general state of the law* which prevailed in *pari materiâ* prior to the enactment of any statute under consideration."

In *Pardo* v *Bingham* (2) Lord HATHERLEY said: "The question is whether on general principles the Statute ought in this particular section to be held to operate retrospectively, the general rule of law undoubtedly being, that except there be a clear indication either from the subject-matter or from the wording of a Statute, the Statute is not to receive a retrospective construction . . . In fact, we must look at the general scope and purview of the Statute, and the remedy sought to be applied, and consider what was *the former state of the law*, and what it was the Legislature contemplated."

Further, in the absence of anything decisive, it is undesirable to give a retrospective effect to an Act where to do so would be to alter the law applicable to a claim in litigation at the time when the Act was passed—*Leeds and County Bank* v. *Walker* (3). Maxwell in the 6th edition of his "Interpretation of Statutes" at page 394 remarks: "In general, when

(1) (1882) I.L.R., 5 All., 121 (135). (2) (1870) L.R., 1 Ch. App., 735 (739 740)

(3) (1883) 11 Q.B.D., 84 (91)

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the law is altered pending an action, the rights of parties are decided according to the law as it existed when the action was begun unless the new Statute shows a clear intention to vary such rights."

That an Act is not to be interpreted, in the absence of an unambiguous direction otherwise, so as to affect vested rights, has been dealt with in the referring order of Mr. Justice SULAIMAN and myself and in the judgement of Mr. Justice DANIELS. Authority for the proposition is to be found *passim* in all the treatises on the interpretation of Statutes and it was further enunciated by their Lordships of the Privy Council in *Muhammad Abdus Samad* v. *Qurban Husain* (1).

Again, it is a general proposition that an Act is not to be considered retrospectively so as to affect a transaction already completed. In *Gardner* v. *Lucas* (2) Lord BLACKBURN said: "Where the effect would be to alter a transaction already entered into, *where it would be to make that valid which was previously invalid*, to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased binding . . . I think the *primâ facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that it is not the case."

How determined the courts have always been to refuse retrospective effect unless it was beyond a shadow of doubt on a consideration of the whole Act and all its circumstances that a retrospective effect was given, is clear from the form of Act VI of 1913 (The Waqf Validating Act) and the cases refusing to give to that Act a retrospective effect: cf. *Naimul Haq* v. *Muhammad Subhan-ullah* (3), where PIGGOTT, J., said: "If the Legislature intended to give

(1) (1903) I.L.R., 26 All., 119 (129). (2) (1878) 3 App. Cas., 582 (603).
(3) (1916) I.L.R., 41 All., 1 (19).

validity to transfers of property *to an unascertained number of past transactions which had no such effect at the time when they were executed*, I should have expected it to do so in very clear terms." Here also we are asked to hold that the Legislature intended to give validity to transfers of property to an unascertained number of past transactions which had no such effect at the time when they were executed. Has the Legislature in this case exhibited any such intention, in very clear terms? The terms of the Waqf Validating Act were infinitely more clear The Legislature had deliberately chosen as full a declaratory form as could well be devised, but reading the Act as a whole this Court refused to give effect to that form. In the present case the Legislature, if it intended the Act to have a retrospective effect, would appear to have carefully avoided expressing that intention in unmistakable terms. It recited no doubts, it recited no difficulties, it declared nothing and it refrained from anything but the ambiguous hint that the Act might have a retrospective effect. We have considered some of the general propositions restricting interpretations in favour of a retrospective effect The converse proposition is thus stated by Craies: "An Act is retrospective (1) when it is expressly enacted that an enactment shall be retrospective, i.e., where such words occur as 'shall operate retrospectively,' (2) where it is a *necessary* implication from the language employed that the Legislature intended a retrospective operation" Emphasis was laid on the strength of the implication required by the Judicial Committee in the case *Colonial Sugar Refining Company* v. *Irving* (1), where, in interpreting the Judiciary Act, the Committee said that it "is not

(1) (1905) A.C., 369.

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retrospective by express enactment or by *necessary intendment.*"

In giving weight to the above propositions I would make it clear that I appreciate that no one of them is conclusive by itself for instance, it is clear that every Act taking effect retrospectively can be said in one sense or another to affect rights of some sort; and similarly with the other propositions, in particular cases they may be open to exception. But where I find each and all of the general propositions when applied to this case as well as all the considerations more particularly concerning this Act, with the single exception of the words "to explain" in the preamble, all pointing in one direction, I find myself impelled to hold that I cannot give to this Act a retrospective effect.

To turn to other considerations which more particularly concern this individual Act. Did it or did it not "alter the law"? * * * * * The law as laid down by their Lordships of the Privy Council and which remained undisturbed for nine years was clear and unmistakable. The law as laid down by the Act under consideration is equally unmistakably different, and different in a very important and far-reaching particular. If it cannot be denied, and in fact is not denied, that the law has been "altered," how can it be contended that the present Act only "declares what the law has always been"? The two propositions are a contradiction in terms. I have referred to the far reaching effect of this alteration. To give the Act a retrospective effect would mean to alter the law as regards all transactions which have taken place throughout India since 1882 with the exception of those that may be barred by limitation.

BY THE COURT.—In accordance with the opinions of the majority of Judges composing the Full Bench the answer to the first question referred is that Act XXVII of 1926 is not retrospective in its nature so as to apply to documents executed prior to its coming into force. In view of this answer the second question referred does not arise.

[On receipt of the opinion of the Full Bench, the original Bench decided as follows —]

In view of the opinion of the majority of the Full Bench that the new Act XXVII of 1926 is not retrospective, it is clear that the deed relied upon by the plaintiff was not a valid mortgage-deed inasmuch as it had not been duly attested as required by the ruling in *Shamu Patter* v. *Abdul Kadir Ravuthan* (1). The appeal is accordingly dismissed. As, however, the findings of the lower appellate court were not satisfactory and the question ultimately raised in appeal was an intricate question of law, we direct the parties to bear their own costs of this appeal.

Appeal dismissed.

(1) (1912) I.L.R. 35 Mad. 607

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice King.

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PHALRAM (PLAINTIFF) *v.* AIYUB KHAN AND ANOTHER (DEFENDANTS).*

Act No IX of 1872 (*Indian Contract Act*), *section* 68—*Guardian and ward—Loan contracted by guardian for benefit of minor—Minor's estate held liable.*

When a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of the minor's estate the minor's estate can be held liable.

Bhawal Sahu v. *Baijnath Pertab Narain Singh* (1), *Krishna Chettiar* v. *Nagamani Ammal* (2), *Subramania Ayyar* v *Arumuga Chetty* (3) and *Sundaram Ayyangar* v *Pattanathusami Tevar* (4), referred to.

THE facts of this case were as follows:

The suit was one to recover money due on a promissory note, dated the 12th of July, 1919, for Rs. 600, executed by Musammat Wahid-un-nissa as certificated guardian of her two minor sons. The promissory note was executed in lieu of an earlier promissory note for Rs. 350 executed by the same person on the 17th of July, 1916.

It was found by both the courts below that the promissory note in suit was genuine and for consideration and that the minors, namely, defendants Nos 1 and 2, were benefited by the loan. Both courts also found that the original loan of 1916 was taken by the mother for the purpose of financing a certain litigation for the benefit of her two minor sons.

* Second Appeal No 132 of 1924, from a decree of Ganga Prasad Varma, Additional Subordinate Judge of Mainpuri, dated the 22nd of October, 1923, confirming a decree of Nand Lal Singh, Munsif of Shikohabad, dated the 9th of August, 1922.

(1) (1907) I.L.R., 35 Calc., 320
(2) (1902) I.L.R., 26 Mad., 380.
(3) (1915) I.L.R., 39 Mad., 915.
(4) (1894) I.L.R., 17 Mad., 396.

The trial court decreed the plaintiff's claim but the lower appellate court allowed the defendants' appeal and dismissed the suit as against defendants Nos. 1 and 2 on the ground that the guardian was not able to bind the minors' estate by means of a promissory note which did not expressly purport to bind the estate.

The plaintiff appealed.

Munshi *Narain Prasad Ashthana*, for the appellant

Maulvi *Iqbal Ahmad*, for the respondents.

The judgement of the High Court (MEARS, C. J., and KING, J.), after stating the facts as above, thus continued :—

The question which we have to decide in appeal is whether the guardian was able to impose a liability upon the minors' estate for the loan incurred on their behalf as evidenced by the promissory note.

The learned counsel for the appellant has referred us to several authorities showing that the estate of the minors is held liable for a loan contracted on behalf of the minors if the loan has been contracted for their benefit. In the case of *Bhawal Sahu* v *Baijnath Partab Narain Singh* (1), the court held that where there is a promise by a guardian of a minor to pay money which has been expended for necessaries, the estate of the minor will be liable, not by reason of the promise but because the money has been supplied. This is in accordance with the general principles embodied in section 68 of the Indian Contract Act. In this case we have the finding of both the courts below that the loan was taken for the benefit of the minors and the loan may well be regarded as a necessity since it was for the

(1) (1907) I.L.R., 35 Calc., 320

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purpose of defending litigation. It appears also that the suit which was defended was dismissed and the minors, therefore, actually did benefit by the loan.

The rulings in *Krishna Chettiar* v. *Nagamani Ammal* (1), *Subramania Ayyar* v. *Arumuga Chetty* (2), *Sundararaja Ayyangar* v. *Pattanathusami Tevar* (3) all show that when a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of a minor's estate then the minor's estate can be held liable.

On equitable grounds the plaintiff is entitled to recover his money and, in our opinion, there is no good authority for the view taken by the court below that the estate of the minors can, in no case, be liable for the debt whether, or not, it was taken for the minors' benefit.

The original loan was for Rs 350 only and we think that it would be fair to allow simple interest at the rate of 6 per cent. per annum from the date of the original loan in 1916 up to the date of suit and thereafter at 6 per cent. up till the date of realization.

We, therefore, allow the appeal and decree in the plaintiff's favour the principal sum of Rs. 350 with interest at 6 per cent. calculated as from the 17th of July, 1916 up to the date of realization. As the suit is decreed on grounds which were not expressly taken by the plaintiff in the courts below, the parties will bear their own costs throughout in all courts.

Appeal allowed.

(1) (1915) I L.R., 39 Mad., 915. (2) (1902) I.L.R., 26 Mad., 390.
(3) (1894) I L.R., 17 Mad., 306

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr Justice King

BALKARAN SINGH AND OTHERS (PLAINTIFFS) *v.* DULARI BAI AND OTHERS (DEFENDANTS).* 1926 June, 25

Act No I of 1872 (Indian Evidence Act), section 90—Presumption—Document more than thirty years old—Appeal—Pleadings—Omission of points which should have been raised and made subject of an issue in the trial court.

The presumption allowed by section 90 of the Indian Evidence Act, 1872, that a document more than thirty years old was executed by the party by whom it purported to be executed also includes the presumption that where the signature of the executant purports to have been made by the pen of a scribe the scribe was duly authorized to sign for the executant *Haji Sheikh Bodha* v. *Sukhram Singh* (1), followed.

An appellate court ought not, as a matter of practice, to allow points to be raised before it which should have been alleged in the pleadings and made the subject of an issue and argument and of decision by the trial court and also stated in the grounds of appeal clearly and directly.

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the appellants.

The respondents were not represented.

MEARS, C. J., and KING, J.:—We are of opinion that this appeal must be allowed Musammat Dulari, who was the only appellant before the Subordinate Judge of Mirzapur, appears to have rested her appeal upon a preliminary point, that no evidence had been produced to prove that "the person signing the mortgage-deed (Bikram Singh) had authority to do so from the real executant." The position of Musammat Dulari was that she had come into this suit for redemption by reason of her having bought from the auction-purchaser some portion of the mortgagee's

* Second Appeal No. 241 of 1924, from a decree of H. Beatty, Subordinate Judge of Mirzapur, dated the 29th of November, 1923, reversing the decree of Nand Lal Singh, Munsif of Mirzapur, dated the 8th of May 1922.

(1) (1924) I.L.R., 47 All., 31

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rights. The issues, which were framed by the learned Munsif, were framed in the main upon her written statement That written statement contains no allegation whatever of any want of authority in Bikram Singh. It was on this one point alone that her appeal was allowed. We have repeatedly stated in this Court that lower appellate courts and this Court sitting either in Letters Patent or in second appeal, ought not to entertain points which should have been alleged in the pleadings and made the subject of an issue and of argument and of decision by the trial court and also stated in the grounds of appeal clearly and directly. The trial Judge does not have an opportunity of giving a decision upon a point such as this and it is not fair to a lower court to upset an appeal on a ground never submitted to it. We, therefore, allow this appeal, but we deem it necessary to call attention to the case reported in *Haji Sheikh Bodha* v. *Sukhram Singh* (1), where it was decided that the presumption which is allowed by section 90 of the Evidence Act, that a document more than thirty years old was duly executed by the party by whom it purported to be executed also includes the presumption that where the signature of the executant purports to have been made by the pen of a scribe the scribe must be duly authorized to sign for the executant In the case under appeal the authority of Bikram Singh who purported to act under the authority of Har Dayal Singh and Musammat Khatua in the execution of the document was challenged. The mortgage-deed was of the year 1876 and we are of opinion that there was a presumption, rebuttable no doubt by evidence, but nevertheless a presumption, in favour of due and proper execution of that document by a person having authority to execute it.

(1) (1924) I.L.R., 47 All., 31.

We, therefore, allow this appeal, set aside the decree of the lower appellate court, and restore that of the court of first instance with costs in all courts

Appeal allowed

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BALKARAN SINGH v. DULARI BAI.

APPELLATE CRIMINAL.

Before Mr. Justice Walsh and Mr Justice Pullan.

EMPEROR *v.* HAR PIARI AND OTHERS *

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Act No. XLV of 1860 *(Indian Penal Code), section* 201—*Section not inapplicable to principal offender—Unexplained death by poison of member of a family—Presumption as to complicity of other members—Act No. I of* 1872 *(Indian Evidence Act), section* 24—*Confession made to a* mukhia, *admissibility of*

A violent presumption arises when a man dies in his own house surrounded by his own family, and poisoned, shortly after eating food which must have been prepared for him by his wife, and no explanation is forthcoming from the members of the household as to what had happened to him to cause his death And where, in addition to such violent presumption, the persons accused are proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased and are also shown to have hidden the corpse to save themselves, the presumption becomes a certainty

A person who has actually committed a crime himself—whether murder or any other crime—is none the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence *Empress* v. *Kishna* (1) and *Queen-Empress* v. *Dungar* (2), overruled.

The mere removal of a body from one place to another so as to remove traces of the place where the murder took place, or indications which implicate a particular individual, even though such removal does not remove undoubted evidence

* Criminal Appeal No 342 of 1926, by the Local Government, from an order of Gopal Das Mukerji, Sessions Judge of Mainpuri, dated the 26th of March, 1926

(1) (1880) I.L.R., 2 All., 713 (2) (1886) I.L.R., 8 All., 259

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that a murder has taken place, is within section 201 of the Indian Penal Code. *Emperor* v. *Autar* (1), followed.

Where one of the accused volunteered to make a confession to a *mukhia*, if he could get some assurance from him (the *mukhia*) that he would do his best to help the accused. *Held*, that such confession was not precluded from being received as evidence by reason of section 24 of the Indian Evidence Act, 1872.

THE facts of this case were as follows :—

Beni Singh, the deceased person, lived with his wife and her parents in the same house. On the evening of the 5th of December, 1925, the wife gave Beni Singh his dinner, and he felt ill soon after eating it and became unconscious. Next morning the wife informed people that Beni Singh had left the house at night and gone away. When three or four days went by, he began to be missed and inquiries made about him were fruitless. Ultimately his corpse was found on digging up the floor of the room. *Dhatura* was found in the viscera. The wife and her parents were placed under trial, the former being charged under section 302 of the Indian Penal Code and the two latter under sections 302/114 and 201. The Sessions Judge found all the accused not guilty and acquitted them. The Local Government appealed to the High Court against the acquittal.

The Government Advocate (Mr. *G. W. Dillon*), for the Crown.

Babu *Harendra Krishna Mukerji*, for the accused.

WALSH and PULLAN, JJ. :—This is an appeal by Government against an acquittal of a family of three persons, namely, Balwant Singh, his wife Musammat Durga, and their married daughter Musammat Har Piari, who were acquitted by the Sessions Judge of Mainpuri on a charge of having poisoned Har

(1) (1924) I.L.R., 47 All., 396.

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Piari's husband. If it were not that the learned Judge has expended upon this quite short case more than seven solid printed pages of matter we should have said that the case was free from any difficulty, and we have no hesitation in agreeing with all the assessors in finding that the wife administered the *dhatura* poison of which her husband undoubtedly died.

Before turning to the express findings of the learned Judge, which we shall have to mention in a moment, we may say broadly what is really elementary in connection with cases of circumstantial evidence, that a violent presumption arises, perhaps one of the strongest presumptions known to the law, when a man dies in his own house surrounded by his own family, and poisoned shortly after eating food which must have been prepared for him by his wife, and no explanation is forthcoming from the occupants of the household as to what had happened to him to cause his death. It is not too much to say that there is hardly one of us, if our own wife or close relation living under our roof suddenly died, and the corpse were found buried in our house, who would not expect to be immediately called upon by the authorities for a clear explanation of the occurrence, and who would be surprised, in the event of our being unable to give it, if we were charged with having caused the death. Where, in addition to such violent presumption, the persons accused are proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased, and are also shown to have hidden the corpse to save themselves, the presumption becomes a certainty. The learned Judge has set out more or less correctly, though framed in verbiage, which sometimes detracts from the value of the fundamental facts, six items of circumstantial evidence which were disclosed by the evidence at the trial

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against the accused. He has discarded at least two on grounds which to our minds are quite inadequate. We refer to the motive, which we think is clearly established, that this young woman was of a loose disposition and quite prepared to get rid of her husband, and the other the evidence of Hoti Lal, who said quite casually that he had seen the wife picking *dhatura* seed from some shrub outside the village and had naturally remarked upon it at the time and against whom there is really nothing except what one may describe as a fanciful suggestion, or even, as my brother said during the argument, the mere fact that he is appearing as a witness for the prosecution. We see no reason whatever for recklessly charging this man, who is an independent person and a Brahman, with deliberate invention of what is after all a small piece of evidence. The learned Judge has omitted from his list one significant fact, which is no reproach to him, because it is one of those facts which require training and experience in criminal investigation to appreciate at its true value, but it is a significant fact that the stomach at the *post mortem* examination was found to contain about 1 lb. of partly digested rice. The Government Advocate has drawn our attention to a statement in Lyon's Medical Jurisprudence that rice has been shown by experiment to be digested in about an hour. We have no medical testimony to assist us, and therefore we can only speculate. It is possible that if a doctor were asked, he would agree that in a person suffering from *dhatura* poisoning which undoubtedly affects the nervous system, the blood is thrown into such a condition that the process of digestion is much retarded, and therefore it is necessary that one should make a substantial addition to the period of an hour in dealing with a person suffering from *dhatura* poisoning. But the presumption is irresistible that he died within a very short time, and

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by that we mean at the most two hours—of his last evening meal. Under the circumstances we have no hesitation in holding that the appeal succeeds, and that all the three persons are guilty of having caused the death of Beni Singh.

We now come to consider the legal question involved in that finding, and with due respect to this very able Judge with great experience, particularly in sessions work, we cannot but express our surprise at the maze of logical fallacies in which, by a superabundance of technical considerations he has drifted, throwing common-sense to the winds. He says that if there had been only one person in the house instead of three, it would not have been at all difficult to fix the guilt. It is consoling to be assured by him that in such a case he would have experienced no difficulty. But inasmuch as fixing the guilt is merely another way of applying what the law calls a violent presumption, which justifies conviction in the absence of any explanation, he overlooks the fact that the same logical process applied to one applies to all, except those who are prepared with an instant explanation of their conduct consistent with innocence. It might at least have occurred to the learned Judge, as he felt himself in a difficulty, that there was another violent presumption drawn from one's knowledge of human nature, and of Indian village life, which it is the duty of a tribunal in such a case to apply, namely, that the food partaken at the evening meal by a husband in an ordinary constituted house is prepared for him and served to him by his wife. The learned Judge in this case had the advantage of the fact that the wife has never denied, if indeed she has not admitted, that she did in fact serve, if not prepare, the evening meal. The most that she suggests—and this seems to be the only point urged on her behalf by Mr. *H. K. Mukerji*, her vakil, which I was able to follow—is that the curd came

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from the nephew Pokhi. But unless the whole dish of which the mixture was composed were prepared by Pokhi, that fact raises no presumption against him, and indeed, if anything, raises a presumption in his favour, because the natural property of *dhatura* being bitterness and curd being itself sour, *gur*, or something equivalent, is required as a vehicle for the poison if its presence is to be sufficiently concealed from the victim to induce him to consume it. The learned Judge seems to have drifted into a logical impasse, so far as we can follow him, in the following way, that inasmuch as there are three persons, one of whom undoubtedly administered the poison, and as nobody else was present, it is impossible for any human being to say which of them did it; and assuming that there was one principal and two abettors, it is impossible to convict either of the three of abetting, because it is impossible to say which of them abetted the third, and inasmuch as one is unable to say which was the principal and which was the abettor, although you are quite certain that the three contained both the principal and the abettor, the law compels you to say that the three contain neither. Such a method of reasoning would, especially in cases of murder at night by armed gangs of dacoits, render conviction in a great number of cases a practical impossibility, and would leave large portions of the population at the mercy of armed dacoits. It ignores the well-established principle that if two men go out at night to waylay a third and to rob him, and undoubtedly rob him because both are found with portions of his property afterwards in their possession, and the third man's corpse is also found in the neighbourhood, although both of them undoubtedly were engaged in the murder, no one of them can be convicted of murder, because no human being can say which of them did it. That fallacy has

been destroyed both by the principles of English Criminal Law as laid down for generations, and also by the appropriate section in the Penal Code, if it were worth while to refer to it.

Unfortunately we are compelled to deal with one or two legal fallacies contained in the learned Judge's judgement Having arrived by a series of fallacies at the paradox that, although he was satisfied that the three accused before him were the only ones who could be possibly guilty of the offence with which they were charged, it was impossible to convict any of them, he seems to have been somewhat startled by the consequence of his own reasoning, and he sought to apply, as a kind of subsidiary refuge from an illogical position, section 201, which makes the concealment of the corpse or the removal of traces of the crime punishable *per se* But here again, owing to two decisions which he cites with accuracy in his judgement, he was confronted with the paradox, which pursued him as a kind of spectre of his own previous decision, that all three contained the murderer though he could not convict anyone of murder; and he found himself unable to convict any of them for concealing the corpse, although they undoubtedly did so, because by his own finding any of them might be the murderer, and the Allahabad High Court had told him that the section could not apply to a murderer. He also found that, if he used section 201 at all, he might by accident be applying it to a murderer when the Allahabad High Court has told him not to. We do not agree with this reasoning. We think that it lacks both logic and common-sense, but as a matter of fact we think it right to deal with the decisions referred to, namely, the case of *Empress* v. *Kishna* (1) and the case of *Queen-Empress* v. *Dungar* (2). They have been seriously questioned and

(1) (1880) I.L.R., 2 All., 713. (2) (1886) I.L.R., 8 All., 252

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dissented from, if not absolutely overruled by two Benches, of which one member of this Bench happened to have been a member on both occasions. The matter seems to come up with such frequency that we think it desirable to express our opinion definitely upon it It is necessary for the purpose of our decision because the Government have appealed on section 201, and the appeal therefore involves the question whether if the Judge were right in acquitting under section 302, he was justified in acquitting under section 201. We hold definitely that both these cases, or at any rate the dicta about to be referred to which are found therein, cannot be accepted as good law

The first point, namely, whether section 201 applies to the actual culprit in a case of murder, is obviously academic. None the less we are unable to agree with the view that a person who has actually committed a crime himself—whether murder or any other crime—is any the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. If the Legislature intended to provide such an exception, they would undoubtedly have said so in express language. This was the point decided in the case of *Queen-Empress* v. *Dunaar* (1) and we hold definitely that it was wrongly decided. Further we agree with the decision in the case of *Emperor* v. *Autar* (2) in holding that the mere removal of a body from one place to another so as to remove traces of the place where the murder took place, or indications which might implicate a particular individual, even though such removal does not remove undoubted evidence that a murder has taken place, is within the section

We are further bound to disagree with the learned Judge in his holding that the confession in this case

(1) (1886) I.L.R., 8 All., 252 (2) (1924) I.L.R., 47 All., 306.

was inadmissible and irrelevant. We say nothing to throw doubt on the proposition that a confession made to another person in the presence of a police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under circumstances that the police officer is in such proximity as to make his presence likely to affect the mind of the confessing person, is in substance a confession to a police officer. That is not this case. The confession was made to the *mukhia*. Why the learned Judge holds it to be inadmissible we do not know. It certainly was not induced by any promise, because, although the *mukhia* is undoubtedly a man in authority, and would appeal to a villager as a person who was able, or likely to be able, to promise him a pardon or some other inducement, in this case Balwant Singh, who made the statement, volunteered to make the statement if he could get some assurance from the *mukhia* that he (the *mukhia*) would do his best to help him. In our view that is not an inducement proceeding from the person in authority within the meaning of the section so as to make the confession either inadmissible or irrelevant.

We have, therefore, to allow the appeal, and the further question arises what we ought to do. We come definitely to the conclusion on this evidence that the wife was guilty of poisoning her husband and must be convicted under section 302, Indian Penal Code. Whether her parents were parties to her act as principals is not so clear, although there is evidence upon which any jury might find that they were. Upon that we give them the benefit of the doubt, but we hold, upon their subsequent conduct, the lies which Balwant Singh told, the undoubted fact that they concealed the death, buried the corpse and showed great signs of fear and uneasiness when the constable spent

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the night in their house, that they must be taken to have abetted the crime under section 302 and to be guilty as abettors. We, therefore, convict them under section 114 read with section 302.

With regard to the sentence, we feel that we have no alternative in this matter. We have reason to think that murders by poisoning of husbands by their wives in Indian villages are much too common and more frequent than the criminal statistics in the provinces indicate. We see no reason to apply the lessor alternative in the case of any woman who cruelly and cold-bloodedly administers poison to the man whom it is her duty to assist, protect and serve.

We, therefore, order Musammat Har Piari to be hanged by the neck until she be dead. The other two, Balwant Singh and Musammat Durga, we sentence to transportation for life.

On the question of section 201 we are bound to record a conviction, although, having regard to the sentence already passed, this matter does not appear to be of any immediate importance. If occasion should arise the case must be put up before us again for sentence.

Appeal allowed.

APPELLATE CIVIL

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice King.

SHEO PARTAB SINGH AND ANOTHER (PLAINTIFFS) *v.* TAJAMMUL HUSAIN AND OTHERS (DEFENDANTS).* 1926 July, 2

Act No. IX of 1908 (*Indian Limitation Act*), *sections* 19 *and* 31; *schedule* I, *article* 132—*Limitation—Acknowledgement—"Period prescribed for the suit."*

The "period prescribed for the suit" as that expression is used in section 19 of the Indian Limitation Act, 1908, is not limited strictly to the period prescribed by schedule I, but will include, in the case of a suit on a mortgage the extra period of limitation given by section 31 of the Act An acknowledgement of the mortgage-debt which is otherwise valid will not, therefore, be the less so if it is given after the period prescribed by article 132, provided that it is within the additional period allowed by section 31 *Vasudeva Mudaliar* v *Srinivasa Pillai* (1), referred to *Bai Hemkore* v *Masamalh* (2), distinguished.

THE facts of this case were as follows:—

The suit was one to recover money due on two mortgages. The first mortgage was dated the 21st of July, 1892. The mortgage-money became due on the 21st of July, 1897, and the period of limitation for the suit, under article 132 of the first schedule to the Indian Limitation Act, 1908, expired on the 21st of July, 1909. The second mortgage was dated the 12th of September, 1892 The mortgage-money became due on the 12th of September, 1896, and the period of limitation, under article 132, expired on the 12th of September, 1908

The plaintiffs' case was that the suit could have been instituted,under section 31 of the Act, up to the

* Second Appeal No 397 of 1924, from a decree of B E Yorke, District Judge of Allahabad, dated the 18th of December, 1923, confirming a decree of Farid-ud-din Ahmad Khan, Subordinate Judge of Allahabad dated the 7th of September, 1922

(1) (1907) I.L.R., 30 Mad., 425 (2) (1902) I.L.R., 26 Bom., 782

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6th of August, 1910, and that before the expiration of that special period of limitation, namely, on the 18th of July, 1910, they had obtained a written acknowledgement of the mortgagors' liability under the deeds in suit, so that the period of limitation was extended under section 19 of the Act up to the 18th of July, 1922. The suit was, in fact, instituted on the 27th of February, 1922.

Both the courts below dismissed the suit on the ground that it was barred by limitation. The plaintiffs appealed.

Babu *Piari Lal Banerji*, for the appellant.

Maulvi *Mukhtar Ahmad*, Munshi *Kamala Kanta Verma*, Maulvi *Haider Mehdi* and Maulvi *Majid Ali*, for the respondents.

The judgement of the High Court (MEARS, C. J., and KING, J.), after setting forth the facts as above, thus continued :—

It is admitted on behalf of the respondent that the right of suit was extended by section 31 up to the 6th of August, 1910, but the argument is that although the right of suit subsisted up to the 6th of August, 1910, nevertheless "the period prescribed for the suit," within the meaning of section 19, is the period prescribed in the schedule, namely, a period of twelve years under article 132. On this reasoning the acknowledgement obtained on the 18th of July, 1910, was ineffectual for giving a fresh period of limitation under section 19.

It is necessary to consider the circumstances in which section 31 was enacted. The view taken by the Allahabad High Court, as well as by certain other High Courts, was that the period of limitation for suits on simple mortgages was sixty years under article 147. Certain other High Courts took the

view that the period of limitation was only twelve years under article 132 The Privy Council in the case of *Vasudeva Mudaliar* v *Srinivasa Pillai* (1) finally decided that the period of limitation was twelve years under article 132 This meant that mortgagees in the United Provinces, whose money had become due more than twelve years before the decision of the Privy Council would be unable to enforce their mortgages. They would have lost their right of suit owing to the wrong interpretation of the law which had prevailed in the United Provinces. In order to prevent such hardship section 31 was specially enacted in the Limitation Act of 1908 enabling mortgagees, whose right of suit would ordinarily be barred by the twelve years rule of limitation under article 132, to bring suits upon their mortgages within sixty years from the date when the money became due or within two years from the passing of the Act, whichever period expired first It is not denied that under section 31 the plaintiff was entitled to sue upon his mortgages up to the 6th of August, 1910, but it is denied that this section lays down a " period of limitation " and it is contended that even if an acknowledgement of liability is obtained within the two-year period no fresh starting point is given for limitation under section 19 The courts below have relied upon the ruling in *Bai Hemkore* v. *Masamalli* (2). In that case it was held that where an acknowledgement is made after the " period prescribed " for the suit has expired, then although the right to sue may be subsisting on the date of acknowledgement, under section 4 of the Limitation Act, nevertheless the acknowledgement will not extend the period of limitation. In our view that case can be distinguished Section 4 does not prescribe any special period of limitation for any kind of

(1) (1907) I L R, 30 Mad, 426 (2) (1902) I L R, 26 Bom, 782

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suit. It only lays down that when the prescribed period of limitation expires on a day when the court is closed then the suit may be instituted on the day when the court reopens. We are in full agreement with the view taken by the Bombay High Court in the ruling mentioned, but in our opinion the ruling in that case is not applicable to the present suit. In the present suit section 31 does, in our opinion, prescribe a special period of limitation for the suit. That period of limitation had not expired at the time when the written acknowledgement was obtained. It necessarily follows, therefore, that the provisions of section 19 operate so as to give a fresh period of limitation from the time of the acknowledgement.

It has been argued for the respondents that in section 19 the words "before the expiration of the period prescribed" must be taken as meaning before the expiration of the period prescribed *in the schedule*. We see no reason for limiting the meaning of the words in the manner suggested. A period for a suit can be prescribed by a section of the Act as well as by an article of the schedule, and in the present case the period of limitation is specially prescribed in section 31 of the Act.

We hold, therefore, that the suit was not barred by limitation and allow the appeal. The suit is remanded to the trial court for decision on its merits. We grant to the appellants costs incurred in the lower appellate court and here. The costs incurred in the trial court are to abide the event of the suit upon its merits.

Appeal allowed.

Before Mr. Justice Sulaiman and Mr. Justice Boys.

KANIZ FATIMA (PLAINTIFF) *v* NARAIN SINGH AND ANOTHER (DEFENDANTS).*

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Act No V of 1920 (*Provincial Insolvency Act*), *sections* 4 *and* 53—*Insolvency—Transfer set aside in proceedings under section* 53—*Ostensible transferees not objecting in spite of notice—Suit for declaration of title barred.*

In a proceeding held by an insolvency court under section 53 of the Provincial Insolvency Act, 1920, the court decided that certain transfers of their property made by the insolvents, the validity of which was questioned by the receiver, were voidable as against him. The ostensible transferees had notice of this proceeding, but did not appear, so that the decision, so far as they were concerned, was *ex parte*

Held, that section 4 of the Act barred a suit by the transferees for a declaration of their title to the property in question. *Maharana Kunwar* v. *E V David* (1), and *Pata Ram* v *Jujhar Singh* (2), referred to.

THIS and a similar appeal preferred by the other transferee were appeals arising out of certain insolvency proceedings which commenced on the 28th of January, 1922, against two brothers, Ehsan Husain and Abdul Majid. About a year before the insolvency proceedings commenced, the two brothers had executed sale-deeds of the property now in question in favour of their respective wives. It appeared that there was some application on the part of the receiver that these properties should be treated as properties of the insolvents. Thereupon the District Judge took proceedings under section 53 of the Provincial Insolvency Act, 1920. Notices were served on the ladies, and they failed to appear. The District Judge, on the 12th of May, 1922, passed an order by which he found the transfers voidable against the receiver and

* First Appeal No 267 of 1923, from a decree of Panwari Lal, Subordinate Judge of Bijnor at Moradabad, dated the 27th of February, 1923

(1) (1923) I.L.R., 46 All., 16 (2) (1917) I.L.R., 39 All., 627.

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annulled them. Subsequently, the ladies filed an application to have these *ex parte* orders set aside. The Judge, on the 30th of October, 1922, held that the service of summonses on the ladies was sufficient and, they having failed to appear, declined to restore the proceedings. He further remarked that though the ladies were *pardanashin* ladies, both their husbands had been present in court on the day of the hearing. Subsequently, on the 25th of January, 1923, the two ladies instituted the suits, out of which these appeals arose, asking for a declaration of their respective ownership of the properties in question. The Subordinate Judge held in both cases that they were bound by the provisions of section 4, clause (2), of the Provincial Insolvency Act and that by the order in the insolvency proceedings the claim of the ladies in each case was *res judicata*. He, therefore, dismissed both suits. The plaintiffs appealed.

Munshi *Sarkar Bahadur Johari*, for the appellant.

Pandit *Mohan Lal Sandal*, for the respondents.

The judgement of Boys, J., after setting forth the facts as above, thus continued :—

The point that we really have to decide is whether strangers to the insolvency proceedings, as these two ladies are, come within the phrase "claimants against the debtor and the debtor's estate" in sub-section (2) of section 4. If they do come within those terms then there can be no doubt that the Judge's order in the insolvency proceedings was final against them. The first consideration that occurs is that if strangers to the insolvency proceedings do not come within the phrase "claimants," it is difficult to understand what class of persons it was intended to cover. So far as I understand the matter, there are only three classes of persons who can possibly be interested in the result of insolvency

proceedings. There are, first, the debtor, secondly, his creditors; thirdly, strangers, whose property is in danger of being mistaken for property of the debtor in the proceedings and sold or distributed to creditors. The first is clearly excluded. It is not possible to conceive a case in which a debtor could be a claimant against his own estate. The second class, creditors, are especially provided for in many other sections of the Act. more particularly under section 28 where. after the adjudication order is passed, a schedule of creditors has to be prepared and provision is made for hearing evidence in regard thereto. There remains, therefore, only the third class to come within the scope of the "claimants", namely, strangers whose property is in danger

Further, even if the word "claimant" includes "creditors," a point which I have not to decide in the present matter, the language is clearly wide enough to include a "stranger" claimant who has become a party to the proceedings.

The next question for consideration is how can a stranger to the insolvency proceedings come before the court. There are several sections which give the court power to take action in regard to property. by which action the interest of a stranger may be in danger. There is section 21 by which property may be attached, and in the course of that attachment a mistake might be made. There is section 28 which vests in the receiver property which is in the ostensible ownership and control of the debtor, and there is section 53 by which the court is given power to annul transfers, with certain exceptions, which have been made by the debtor within two years of the adjudication

When property is attached in which a stranger claims an interest, it may be that the stranger will prefer to make no objection before the insolvency court but to file a separate suit. In that event it may well be

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Boys, J.

that the proceedings before the insolvency court will have no effect upon the right of the stranger. That, however, is not the case before us. Nor are we concerned with the effect of any order in regard to property under section 28(*iii*). The case before us is one where the court is proceeding to inquire into the validity of transfers under the provisions of section 53 with a view to the possible annulment thereof. In pursuance of proceedings under those sections a notice was issued to the present appellants to show cause why the transfers should not be annulled. Power to arrive at a decision on the question of the ownership of those properties is given by section 4 of the Act. To ascertain what procedure is to be followed we have to refer to section 5 of the Act. That section lays down:

"Subject to the provisions of this Act, the court, in regard to proceedings under the Act, shall have the same power and *shall follow the same procedure* as it has and follows in the exercise of original civil jurisdiction."

It is clear, therefore, that there is ample opportunity to a stranger to protect his own interests as fully as if the matter were to be decided in an ordinary suit. There is, therefore, *primâ facie* no prejudice to the stranger if he prosecutes his resistance in the interest of his property with due attention in the insolvency court and there is, therefore, *primâ facie* no reason why the decision so arrived at should not bind the stranger. Further, sub-section (2) of section 4 appears to be conclusive in this regard. It declares that a decision so arrived at shall be final "subject to the provisions of this Act," i.e., subject to the rights of appeal given by the Act. It is, therefore, manifest that the plaintiffs having neglected the opportunity fully given to them in the insolvency court, had no right of separate suit in the ordinary civil court to set aside the order passed by the insolvency court, and there is, therefore, no force in this ground of appeal.

The only case to which our attention has been drawn, in which this question came up for consideration is that of *Maharana Kunwar* v. *E. V. David* (1). In that case my brother Mr. Justice SULAIMAN held that section 4 was applicable to the case of a stranger to the insolvency proceedings and remarked:

"If a question of title has been actually raised by a stranger to the insolvency and decided by the insolvency court, the decision is final and the question cannot be re-opened in a separate regular suit."

Mr. Justice LINDSAY, who was a party to the decision in that case, remarked:

"I am not prepared to take the view that a decision under sub-section (2) of section 4 would be binding upon a stranger like the plaintiff in the present case, who, in my opinion, is not making any claim against the debtor or the debtor's estate. What the plaintiff in the present suit is saying is that the property about which the dispute exists does not belong to the debtor's estate and never did belong to it, and so I cannot see how it can be said that she in the present proceedings is claiming against the debtor or his estate. That question, however, does not arise for decision and these observations are consequently *obiter*."

It is true that the views expressed were in that case to this extent certainly *obiter*, in that the plaintiff in that case had not taken any part in the proceedings before the insolvency court. The plaintiff's property had been attached, but the plaintiff had allowed the matter to remain there and had taken no objection before the insolvency court. It is, therefore, true that she could not be regarded as having been in the insolvency court a claimant against the debtor's estate. But I take it that the remarks of Mr. Justice SULAIMAN only meant this that if the plaintiff has, as a matter of fact, resisted or been called upon to resist

(1) (1923) I L R., 46 All., 16

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the proceedings in the insolvency court, the plaintiff would have had to be regarded as "a claimant against the debtor's estate." With that view I have already expressed my agreement

If then the plaintiffs had no right of suit at all their appeals must fail and it is not necessary for us to enter into the question whether a notice under section 80 of the Code of Civil Procedure to the receiver was, or was not, necessary.

I would dismiss both appeals with costs.

SULAIMAN, J.:—I agree. The court below has dismissed the suit on two grounds: first, that the receiver appointed by the insolvency court was a public officer and two months' notice under section 80 of the Code of Civil Procedure was necessary, and, secondly, that the claim is barred in view of the provisions of section 4 of the Provincial Insolvency Act, 1920

A public officer is defined in section 2, sub-section (17). I am not prepared to say off hand that a receiver appointed by an insolvency court, in the case of a particular insolvent, as distinct from an official receiver, is an officer of a Court of Justice within the meaning of sub-clause (*d*) of that sub-section The case of *Anna Laticia De Silva* v. *Gobind Balvant Parashare* (1) has been relied upon, which case has been referred to in a judgement of this Court in the case of *Murari Lal* v. *E. V. David* (2). I prefer to reserve my opinion on this point.

It is, however, clear that the present suit is barred by section 4 of the Provincial Insolvency Act. The receiver applied to the insolvency court for adjudicating certain transfers to be fraudulent and to cancel the same The application was under section 53 of the Act. Notice was issued to the plaintiff, and

(1) (1920) I.L.R., 44 Bom., 695 (2) (1924) I.L.R., 47 All., 291.

though there was due service she did not appear and the case was heard *ex parte* and decided against her on the merits. She applied to have the *ex parte* order set aside but failed. The adjudication of the insolvency court is, in my opinion, final. The fact that the proceedings were *ex parte* can make no difference. Section 4, sub-section (1) of the Provincial Insolvency Act gave full power to the court to decide all questions of title or priority or of any nature whatsoever, whether involving matters of law or fact, which may arise in the case or which the court may deem it expedient or necessary to decide The court did in fact decide the question of fact The present plaintiff must be deemed to be a claimant against the debtor or his estate inasmuch as she was putting forward a claim to a part of the property which was claimed by the receiver as belonging to the insolvent Section 4, sub-clause (2) is wide enough to cover such a case The decision *inter partes* must be deemed to be final and binding I adhere to the view expressed by me in the case of *Maharana Kunwar* v *E V. David* (1), even though it might not have been necessary to decide that point in that case Unless disputes between the receiver and strangers, as distinct from creditors, can come within the scope of section 4, it is difficult to see how questions of title can be decided by the insolvency court at all. In my opinion the enactment gives effect to the view which prevailed in this Court even under the old Provincial Insolvency Act; vide *Pitu Ram* v *Jujhar Singh* (2)

Sulaiman, J.

BY THE COURT.—Both the appeals are dismissed with costs.

Appeal dismissed

(1) (1923) I.L.R., 46 All., 16. (2) (1917) I.L.R., 39 All., [illegible]

Before Mr. Justice Walsh and Mr. Justice Pullan.

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MUHAMMAD ZAFAR (DEFENDANT) *v.* ZAHUR HUSAIN AND OTHERS (PLAINTIFFS) *

Act No I of 1872 (Indian Evidence Act), section 65—Suit on a mortgage—Deed not produced nor loss satisfactorily explained—Pleadings—Alternative pleas of non-execution and payment—Plea of payment no admission of the deed

Plaintiff sued upon an alleged mortgage, but did not produce the deed on which he relied. He stated that it had been lost on the way to court, but failed to produce any evidence which satisfied either the trial court or the lower appellate court that the deed had in fact been lost. *Held*, that, subject to the provisions of section 65 of the Indian Evidence Act, 1872, the plaintiff's suit could not be maintained.

Held also, that there is no objection to the defendant to a suit on a bond raising as alternative pleas the denial of execution and payment; the raising of the second plea will not amount to an admission of the bond and will not relieve the plaintiff from the necessity of proving the loss of the original.

Sri Ram v. *Ram Lal* (1), *Mulla* v. *Deo Karan* (2), *Chuni Kuar* v *Udairam* (3), *Hutton* v. *Ward* (4) and *Hansard* v. *Robinson* (5), referred to.

THE facts of this case were as follows :-

The plaintiff sued on a mortgage bond. He did not produce the bond upon which he relied; but alleged that it had been lost whilst he was on his way to the court Of the truth of this statement, however, he failed to satisfy the court by any evidence The defendant pleaded, first, that he never had executed such a bond and in the alternative that the bond had been discharged The court of first instance, relying upon the defendant's alternative plea as amounting to an admission of the bond, gave the plaintiff a decree, and this

* Second Appeal No. 507 of 1924, from a decree of Abdul Hasan, Additional Subordinate Judge of Moradabad, dated the 20th of December, 1923, confirming a decree of Banwari Lal, City Munsif of Moradabad, dated the 29th of November, 1922

(1) (1918) 11 A.L.J., 255 (2) (1918) 11 A.L.J., 784.
(3) (1883) I L R, 6 All., 73 (4) (1850) 19 L.J., Q.B., 299.
(5) (1827) 7 B & C, 90.

decree was confirmed on appeal by the Additional Subordinate Judge. The defendant thereupon appealed to the High Court.

Mr. *A. Sanyal* and Babu *A. P. Bagchi*, for the appellant.

Maulvi *Mukhtar Ahmad* (for Maulvi *Iqbal Ahmad*), for the respondents.

WALSH and PULLAN, JJ. :—This is a curious case, although, we are afraid, it is also a typical case. It is, however, by no means an easy case to dispose of. The plaintiff sues upon a mortgage bond in common form, and claims payment of the amount due or sale of the hypothecated property. The bond is said to be lost. This loss has not been established to the satisfaction of either court. We are not surprised Without finding any facts we can only say that the allegation of the plaintiff, that it dropped out of his hand, or pocket, or folds of his *dhoti*, on his way to the court to file a suit on it, though not impossible, is an extremely unlikely event. We will not discuss the probabilities of the plaintiff discovering this unfortunate accident by the use of his senses, and taking immediate steps to recover the document, or the suspicious conduct of the plaintiff in going straight off to the police-station and making a formal report. If there had been a crowd of people through which he was pushing his way, or a high wind which immediately carried the bond out of his sight and beyond recovery, we could have understood this extraordinary event. We can only say that we regard the whole story with the gravest possible suspicion. The Munsif escaped the necessity of arriving at a decision on this point by relying upon an authority with which we will deal in a moment. The Subordinate Judge, while properly agreeing with the Munsif because he was really bound by the decision, which was a decision of a Judge of this

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Court, could not resist expressing his view about the evidence, and the case, therefore, reaches us with a finding of fact that the loss is not established by satisfactory evidence.

The case relied upon is *Mulla* v. *Deo Karan* (1), a decision of Mr. Justice RAFIQUE, that although the execution of the bond was not expressly admitted the plea of payment amounted to an admission of the execution of the bond, and that the plaintiff could maintain a suit on the copy of the deed without proving the alleged loss. With all respect to the learned Judge who decided that case, and who was a most experienced Judge in matters which may be described as questions of business, it appears to us that he was misled In the first place, it is not true to say that an inconsistent plea turns a preliminary plea in the same written statement into an admission when it is not in fact an actual admission. This matter will be found fully discussed in a chapter by Dr. Weir in a recent book published on the principles of pleadings. Alternative pleas have always been admitted from the earliest days for excellent reasons. A libel suit is, perhaps, the best illustration A defendant is perfectly entitled to deny publication and to deny that the libel refers to the plaintiff, even although he pleads alternatively that the libel is true. The reason for that is a perfectly sound one, justified by the view of lawyers from all time. It has the effect of forcing the plaintiff into the box, and also the man to whom the libel or slander was published, and, therefore, the defendant by his pleadings puts the plaintiff to proof, so that he is able to assure himself that the plaintiff cannot keep out of the witness-box and will be compelled to submit to cross-examination on a question of justification. Similarly, in a case like this a defendant

(1) (1913) 11 A.L.J., 784.

may well deny the existence of the bond, or its execution, consistently with an alternative plea that it is paid, if he instructs his pleader that the actual production of the original document will show by the endorsements upon it that the payments have been made In other words, he forces the plaintiff to prove the document. It appears to us that the learned Judge was misled by the view taken in the case of *Chuni Kuar* v. *Udairam* (1), which, unless it was a ruling upon a specific finding of fact, appears to us to be worthy of further consideration, and further the learned Judge distinguishes the case which he was deciding from the case of *Sri Ram* v. *Ram Lal* (2), upon a fine distinction, namely, that the defendants in that case were not the original executants but were transferees, a ground which appears to us to be no real distinction. In the case of *Sri Ram* v. *Ram Lal* (2) it was held that the alternative plea of payment did not amount to an admission of the mortgage sufficient to relieve the plaintiff from proving the loss of the original deed, and to entitle him to sue upon a copy of it. We agree with that decision. We respectfully think that Mr. Justice RAFIQUE should have followed it. At any rate the principle there laid down is clearly right and ought to be followed.

We are prepared—and in this respect we are of opinion that we are laying down no new law at all—to hold definitely in a case like this that the plaintiff cannot sue upon the bond without producing it, subject, of course, to the provisions of section 65 of the Evidence Act

With regard to bills of exchange in England and doubtless also in India, because the law in both countries has been codified on the same lines, it has

(1) (1889) I.L.R., 6 All., 78 (2) (1913) 11 A.L.J., 255

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always been held that the bill must be produced in court. Even where the execution of the bill is admitted and liability is not disputed, it has been held by a strong court in the case of *Hutton* v. *Ward* (1) that interest cannot be claimed unless the bill is produced showing the date of maturity from which interest is to run, and it is worth while, on this question of the fundamental necessity of production of the document upon which the suit is brought, to draw attention to the observations of one of the greatest commercial lawyers of his century, Lord Chief Justice TENTERDEN, in the case of *Hansard* v. *Robinson* (2). No doubt different considerations apply to negotiable instruments which were based upon the custom of merchants, but for this purpose there is no distinction between a negotiable instrument, which is transferable by delivery, and a bond, which is far more common for an ordinary debt transaction in India and takes the place of bill transactions which are more usual in England, so far as transferability is concerned. Lord TENTERDEN says and in using this term he is expressing the law merchant at the time—"the custom is that the holder of the bill shall present the instrument at its maturity to the acceptor to demand payment and upon receipt of the money deliver up the bill." If one substitutes for the word "holder" the word "bond-holder" and for the word "acceptor" the word "debtor" the passage would run as follows:—"The debtor paying the bond has a right to the possession of the instrument for his own security and as his voucher and discharge in his account with the bond-holder. If, upon an offer of payment, the bond-holder should refuse to deliver up the bond, can it be doubted that the debtor might retract his offer and retain his money, and if this be the right of the debtor when the bond is due, must not

(1) (1850) 19 L.J., Q.B., 293. (2) (1827) 7 B. & C., 90.

his right be the same if, though not ready at the due date, he is ready afterwards, and can his right be varied if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher, and his discharge towards the bond-holder remain unchanged. It will be the same thing whether the instrument has been destroyed or mislaid. But how is he to be assured of the fact, either of the loss or destruction of the bill?" And the passage then goes on to point out what may happen even in the case of a lost bond, when the debtor is required to pay again by a *bonâ fide* transferee for value from the original bond-holder. This does no more than emphasize the importance of production, indeed the right of the debtor to demand production Section 65 of the Evidence Act provides an alternative to the bond-holder in cases where, for various reasons, production of the original is impossible, but if a copy is in existence, production is not dispensed with by that section, and the observation of Lord TENTERDEN, and our own view of the strict provisions of section 65, emphasize the importance of the trial court exercising the greatest circumspection and care in deciding the fundamental question of fact, which, becoming *res judicata* between the parties, may be of vital importance to the defendant as to whether there really has been a *bonâ fide* loss. We may mention by the way that it is a recognized principle of evidence in England, and the presumption reasonably is within the four corners of the Evidence Act, that every deed being the best evidence of its own contents, its non-production raises the presumption that it contains some defeasance In other words, it is not an unreasonable presumption from the non-production. in a case of this kind, that there was some endorsement on the document which the plaintiff did not

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like. It is, perhaps, not irrelevant to observe that people in this country are particularly careful in preserving what they treasure, and particularly documents. They have been known even to preserve in a locked box a judgement of the High Court, and they are people by nature and habit unlikely easily to lose a document so treasured, generally for a long period of years, as a mortgage bond, particularly at the moment when it becomes necessary to transport it to the court for the purpose of filing a suit. The statement of the plaintiff that this document had been kept in an iron box duly locked for at least two years, and had disappeared in this sudden and mysterious fashion, almost suggests the conduct of some wild bird which had been kept in confinement in a cage for a long period, and makes its escape into freedom and its natural element at the first opportunity. The whole story suggests itself to us as almost farcical and incredible If we thought that we were doing any hardship to the plaintiff in this particular case, we should have referred back issues for further findings. There is a plausible case for doing so because the Munsif has avoided a specific finding, but for the reasons already given, we are satisfied that the only just thing to do in this case is to act upon the finding that the plaintiff's evidence did not satisfy the lower court, and to allow the appeal with costs here and below.

Appeal allowed

APPELLATE CIVIL.

Before Mr. Justice Sulaiman and Mr. Justice Boys

DEOKI RAI (DEFENDANT) *v* HARAKH NARAIN LAL (PLAINTIFF) *

1926 May 17

Act No IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 35(ii)—Small Cause Court Suit—Suit for compensation for unauthorized felling and removal of a tree—Test for deciding whether a suit is excepted from the provisions of the Act

The question whether a suit is or is not one of a Small Cause nature must be decided according to the allegations made by the plaintiff in his plaint If these allegations make out a case which is excepted, it is immaterial what the defence raised is, or what the actual findings arrived at by the lower courts are

Article 35(ii) of the Provincial Small Cause Courts Act covers all suits for compensation for loss occasioned by an offence under chapter XVII of the Penal Code

The following cases were referred to in the order of reference to a Division Bench:—*Kunwarpal* v *Bakshi Madan Mohan* (1), *Sham Sunder Ram* v. *Ram Het* (2), *Dilbar Hossain* v. *Sadaruddin Chaudhri* (3), *Dukhi* v. *Dhanni Misir* (4), *Man Singh* v *Madho Singh* (5), *Mathura* v *Raghunath Sahai* (6) and *Kunwar Singh* v *Ujagar Singh* (7).

This was a suit for Rs. 49, the price of a *nim* tree cut down by the defendant In paragraph 3 of the plaint, the plaintiff alleged that the defendant-appellant unlawfully colluded with the other defendant and forcibly cut and appropriated the said tree

* Second Appeal No 1499 of 1923, from a decree of H Beatty, District Judge of Ghazipur, dated the 11th of August, 1923, confirming a decree of Muhammad Abdul Ahad, Honorary Munsif of Rasra, dated the 3rd of August, 1922

(1) (1923) 21 A L J , 213
(2) (1924) 81 Indian Cases, 1029
(3) (1922) 77 Indian Cases, 77
(4) (1923) 21 A L J., 357
(5) (1923) 22 A L J , 70
(6) (1920) 18 A L J , 351
(7) (1921) 65 Indian Cases, 7.

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without any right and in spite of the remonstrances of the plaintiff's servant. In his defence the contesting defendant admitted the cutting down of the tree, but denied the rest of the allegations. He set up the plea that this tree, along with other trees, had been planted by his ancestors and had been possessed by the defendant for a long number of years and that he had proprietary possession over it. The Honorary Munsif, who tried the case, decreed the claim. The District Judge, in appeal, was of opinion that the issues framed by the lower court were not correct, but thought that, inasmuch as the appellant had no case at all on his own admission, he need not send the matter back for re-trial. The District Judge recorded no finding as to whether the tree had been planted by the defendant's ancestors or whether it had been in possession of the defendant. He came to the conclusion that, in the absence of any provision in the *wajib-ul-arz* or any other rule of law or right, the defendant could not claim title to this tree, which had been standing on the *abadi* land.

One of the defendants appealed to the High Court and when the case came on for hearing before a single Judge a preliminary objection was raised by the respondent that no appeal lay.

With regard to this point the appeal was referred to a Bench of two Judges. The order of reference (SULAIMAN, J.), after stating the facts as above, thus continued:—

There is, undoubtedly, some conflict of opinion on this question. The Provincial Small Causes Courts Act has been amended and sub-clause (ii) has been added to clause 35, and clause 43(A) added to clause 43. Under clause 35(ii) a suit for compensation for an act which is or, save for the provisions of chapter IV of the Indian Penal Code, would be, an

offence punishable under chapter XVII, is excepted Similarly, under clause 43(A) a suit to recover property obtained by an act which is or which would be such an offence is also excepted. LINDSAY, J., in the case of *Kunwarpal* v *Bakhshi Madan Mohan* (1), took the view that where the defendant had denied that any offence had been committed and where he himself was the applicant, it did not lie in his mouth to say that the act in respect of which the suit was brought was an act amounting to an offence. He further held that, where a person had cut away trees in the exercise of his alleged right, claiming the trees to be his own, he cannot be said to be committing the offence either of theft or of mischief In the case of *Shiam Sunder Ram* v. *Ram Het* (2), DALAL, J, admitted that there was a conflict of authorities in this case as to the interpretation of article 35(ii). He decided the case before him on the finding that on the facts of that case the defendant could not have been charged of an offence of theft, because he acted under a claim to the property The paper-book in this case does not show whether the property had been removed from the custody of the trustee without his consent or whether there were any allegations in the plaint suggesting the commission of an offence. In the case of *Dilbar Hossain* v. *Sadaruddin Choudhri* (3), a Bench of the Calcutta High Court also took the view that the criminality of the act of the defendants would depend on the intention with which this act was done. On the other hand, RAFIQ, J., in the case of *Dukhi* v. *Dhanni Misir* (4), held that the case before him fell under article 35(ii), although there too the defendant was resisting the plaintiff's claim and denying his allegations. KANHAIYA

(1) (1925) 21 A L J, 213.
(2) (1924) 81 Indian Cases, 1029
(3) (1922) 77 Indian Cases, 77
(4) (1923) 21 A L J, 357

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LAL, J., in the case of *Man Singh* v. *Madho Singh* (1), held that the allegation of the plaintiff amounted to a charge of criminal misappropriation and clause 35(n) was applicable. In that case, however, as one of the reliefs was a recovery of the wood, he also held that clause 43(A) was similarly applicable.

I may refer to two more cases, which, however, were disposed of on a slightly different ground. In the case of *Mathura* v. *Raghunath Sahai* (2) and *Kunwar Singh* v. *Ujagar Singh* (3) the allegations in the plaints did not disclose that any criminal offence had been committed by the defendants.

THE case was accordingly laid before a Bench.

Munshi *Surendra Nath Varma*, for the appellant.

Munshi *Haribans Sahai*, for the respondent.

SULAIMAN, J :—A preliminary objection is taken that no second appeal lies. In my order of reference I referred to some rulings showing that there has been a conflict of opinion. It is not necessary to mention them over again In that order I suggested that in order to decide whether a suit is one of a Small Cause nature or not, one should refer to the allegations of the plaintiff as contained in the plaint. If those allegations make out a case which is excepted, it is immaterial what the defence raised is, or what the actual findings arrived at by the courts below are. I pointed out that, if the defendants were held to be estopped from contending that the suit was not cognizable by a Court of Small Causes, merely because they themselves had not admitted that any offence under chapter XVII of the Indian Penal Code had been committed, the result would be that the plaintiff may be entitled to prefer a second appeal, if the

(1) (1928) 22 A.L.J., 70 (2) (1920) 18 A.L.J., 354.
(3) (1921) 65 Indian Cases, 7.

decision went against him, but the defendant would be estopped from doing so I doubted if such a contingency could have been contemplated by the legislature. I still adhere to the same view All that we have to see is whether the suit as brought was one cognizable by a Court of Small Causes This can be ascertained only by examining the allegations made in the plaint. If the plaint as drafted was not entertainable by a Court of Small Causes, it must be held that the suit was not of a Small Cause Court nature, irrespective of anything that might have been subsequently put forward in defence or found by the court.

Sulaiman, J

As to the contention that article 35(ii) must be confined to cases where the suit is for compensation for the offence itself and not for compensation for the loss occasioned by the offence, I admit that the language of this clause might have been made clearer. The argument is permissible merely because the language is not happy. But I have no doubt in my mind that it was intended to cover all suits for compensation for loss occasioned by an offence under chapter XVII of the Indian Penal Code The object seems to be to take away cases, where serious allegations amounting to the commission of an offence are made, from the cognizance of the Courts of Small Causes. If we were to adopt the contention urged on behalf of the respondents, the result would be that, with the exception of perhaps suits for compensation for trespass or mischief, all suits for compensation for property taken away by dacoity, robbery, burglary, theft, extortion, etc , would be cognizable by a Court of Small Causes. This would destroy the very utility of the provision. I am further fortified in this view by the fact that in many cases, decided by the various High Courts, it has been assumed, though not

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expressly decided, that suits for compensation for property removed by theft or misappropriation come under article 35(ii).

In the present case the allegations in the plaint are that the defendants unlawfully colluded with each other and forcibly cut and appropriated the said tree without any right in spite of remonstrances of the plaintiff's servants These allegations undoubtedly make out an offence of theft and mischief. The suit was, therefore, excluded from the jurisdiction of a Court of Small Causes and, therefore, a second appeal lies

BOYS, J.—I agree. The matter is, in my opinion, very simple, though, in view of the language used in certain of the decisions quoted in my brother's order of reference, it was necessary to refer the case to a Division Bench.

There can be no question but that the jurisdiction of the court has to be determined in the first place by a reference to the plaint. That which is exempted from the jurisdiction of the Small Cause Court is "a suit" of a certain nature. To determine of what nature "the suit" is, we have obviously got to see what is sued for, and that brings us to the plaint and there is no need to go any further.

Next we have to see whether the facts alleged in the particular plaint—if the facts had been alleged before a Magistrate—would have justified a Magistrate in holding that there were allegations of an offence coming within one or other of the definitions in chapter XVII of the Penal Code.

In this case the plaint alleges that the plaintiff was the owner of a *nim* tree with which the defendants had no concern; that the defendants forcibly cut and appropriated the tree; and that the defendants

committed this act after unlawfully conspiring together.

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Here we have clearly set out the elements necessary to constitute the offences of theft and mischief. The defendants were alleged to have deliberately with the intention of causing wrongful gain to themselves, that is, dishonestly, taken movable property, i.e., the wood after it had been cut (vide Explanations 1 and 2 to section 378) out of the possession of the plaintiff. The defendants were further alleged by the plaintiff to have, knowing that they were likely to cause wrongful loss to the plaintiff, caused the destruction of the tree and thereby were clearly alleged to have committed mischief within the meaning of section 425 of the Penal Code. There is clearly a suit for compensation for an act which is an offence punishable under chapter XVII of the Penal Code. It is suggested that the suit must be one for compensation "for an act" and that here the suit is for compensation "for the value of a tree." It is obvious that no plaintiff has any interest whatever in the mere cutting of a tree; it is only in this aspect of its causing damage or loss to him in one way or another that he is interested. I have no hesitation in holding that the case was one exempted from the cognizance of a Court of Small Causes, and that a second appeal lies.

Hays, J.

[The appeal was then heard on the merits and the case was remanded under order XLI, rule 23, of the Code of Civil Procedure.]

Appeal allowed and cause remanded.

ORIGINAL SUIT.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

1926 June, 7.

THE SWADESHI MILLS COMPANY, LIMITED, BOMBAY (PLAINTIFF) *v.* JUGGI LAL, KAMLAPAT COTTON SPINNING AND WEAVING MILLS COMPANY, LIMITED, CAWNPORE (DEFENDANT).*

Trade-mark—Acquisition of right to, by user—Infringement of —Remedy—Injunction—Damages—Act No. I of 1872 (Indian Evidence Act), section 45.

Where a manufacturer has been for some time in the habit of marking goods made by him with a particular trade-mark or set of marks, so that goods bearing such marks will be commonly supposed to be of his manufacture by anyone wishing to purchase goods of the kind made by him, he may acquire by user a right to the exclusive use of such mark or marks and an action will lie against anyone who sells goods not manufactured by him bearing such mark or marks which are so similar thereto that they would probably induce people of the class which generally purchase goods of such a kind to believe that they were of his manufacture.

The question of the similarity of the fraudulent mark to the true mark is not one of evidence but is a question for the Court to decide

The principles on which damages in the case of an infringement of a trade-mark should be assessed discussed.

Seixo v. *Provezende* (1), *Leather Cloth Company* v. *American Leather Cloth Company* (2), *Payton & Co., Ltd.* v. *Snelling Lampard & Co.* (3), *Blackwell* v. *Crabb* (4), *Singer Manufacturing Co.* v. *Loog* (5), *Board & Son* v. *Bagots* (6) and *Birmingham Vinegar Brewery Co., Ltd.* v. *Powell* (7), referred to.

* Original Suit No. 1 of 1925.

(1) (1866) L R, 1 Ch, 192
(2) (1865) 11 H.L.C., 523.
(3) (1901) A C, 308
(4) 36 L.J Ch., 504.
(5) (1882) L R, 8 A C, 15
(6) (1916) 2 A C., 382.
(7) (1897) A.C, 710.

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THE facts of this case were as follows:—

The suit was one for damages for infringement of a trade-mark It was filed originally in the court of the Subordinate Judge of Cawnpore, but was transferred to the High Court. partly on the ground of expedition, but mainly because the case was stated to be one of great general importance to the manufacturing community.

The plaintiffs, the Swadeshi Mills Company, Ltd., were manufacturers of various kinds of cotton goods and the undertaking was managed by the well-known firm of Messrs. Tata & Co. The original defendant was a firm known as Messrs Juggi Lal Kamlapat After the suit was filed, it was discovered that the business had been incorporated as a private company and, therefore, the company was added as the second defendant

The plaintiffs' case, as disclosed in the plaint and put forward by counsel when the issues were framed, was that they had been, since 1888, manufacturing cotton goods of various kinds and used from the very first a lotus flower as their characteristic trade-mark It was stated that since 1909, their principal trade-marks had taken three shapes One was a coloured label bearing a lotus flower and some lotus buds emerging from water, as shown by the top-most figure on the left hand of the photograph marked as Exhibit 3, dated the 19th of May, 1926. Exhibit E was the actual label and showed a dark red and pink flower. It was the one almost invariably used, but at times on a very small portion of their goods the plaintiffs used a plain blue lotus flower (Exhibit J) Exhibit E was not unlike the natural flower The blue lotus was fanciful. The second was an oval impression stamped by mechanical means on cloths and

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individual garments, bearing the same flower and buds as the coloured label, with a letterpress indicating the name of the plaintiffs. Exhibits Nos. 3 and 3A were the impressions made on the goods Below the oval was an enclosed space within which the word "kamalchhap" appeared in Gujrati language The third was shown in the middle photograph on the left hand side of the same photographic Exhibit 3 and was described throughout the evidence as a trefoil. Exhibit F was the impression as it appeared on cloth The letterpress contained the name of the plaintiffs and an inscription to the effect that the mill is a manufacturer of Indian goods and is Indian in its every feature. The plaintiffs used these marks singly or in combination to indicate goods manufactured by them. The coloured lotus flower (Exhibit E) was used either by itself or in conjunction with the trefoil (Exhibit F). Other cloths bore the oval impression No 3 together with the pediment of "kamalchhap" and the "trefoil" below it. The plaintiffs alleged that by thus using these impressions and labels for a long time they had acquired for their goods the popular name of "kamalchhap" (lotus ticket) and that these marks had become known to the trade and the public as indicative and exclusively so of goods of their manufacture and of their manufacture alone. It also transpired, in the course of the evidence, that the plaintiffs claimed that their goods were also known as "phulchhap" (flower print). The plaintiffs' goods had a wide sale over a great part of India, but the places with which this action was concerned were principally Cawnpore, Delhi, Calcutta and Amritsar. The defendants, so the plaintiffs alleged, with the object of stealing the trade of the plaintiffs, manufactured cotton goods in their mill and affixed and applied labels and marks similar to

those of the plaintiffs, the intention being to pass off the defendants' goods as and for the goods of the plaintiffs. The plaintiffs said that they discovered that this was being done by the defendants in July, 1924, and called upon them to desist. The defendants, however, refused to do so and the plaintiffs therefore brought the suit. The plaintiffs prayed for an injunction restraining the defendants from using their trade-marks, asked for delivery up of the goods of the defendants bearing those marks and for an account Alternatively, they asked for damages. In the course of the trial the learned counsel for the plaintiffs gave up the claim for accounts and rested his case as regards pecuniary relief on damages only.

The defendants filed separate written statements, but their case was substantially the same The defendant company, however, pleaded that since their incorporation, they had not used the trefoil and had abandoned also the use of the word "phulchhap" in Hindi The defendants denied that the plaintiffs' marks, stamps and designs had acquired any reputation of "kamalchhap" and urged that even if they had done so, the plaintiffs were not damnified, as the defendants' goods were not inquired for under the designation of "kamalchhap" They further pleaded that the marks and stamps and labels used by them were neither an actual nor a colourable imitation of those used by the plaintiffs and there was no reasonable probability of deception and they alleged that the plaintiffs had no proprietary title to the marks and labels claimed by them and the plaintiffs were not entitled to any relief.

The following issues were settled :—

(1) Have the plaintiffs since the year 1888 been using continuously the design of a coloured lotus flower (Exhibit A) emerging from water and, since the

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year 1909 till the date of this action, a lotus of the pattern as Exhibit E, on dhotis, chaddars, longcloths and other goods?

(2) Have the plaintiffs been impressing continuously on their said goods the triangular and oval design in conjunction with each other (Exhibits Nos. 3, 3A and F) since at least the year 1909? (Exhibits Nos. 3 and 3A are one and the same, the only difference being in size and clearness of print.)

(3) Has the user referred to in issues Nos. 1 and 2 given to the plaintiffs any exclusive right to the said design and figure so as to enable them to restrain any person manufacturing or selling goods with a colourable imitation of the same design attached thereto and figures impressed thereon?

(4) Have the said goods of the plaintiffs, so distinguished as aforesaid, acquired a reputation in the Indian market? Are the said goods of the plaintiffs known to the trade or to the general public under the name of "kamalchhap"?

(5) Have the defendants by use of a flower (Exhibit D) and by impressing the oval design (No. 4) and the triangular design (Exhibit G) got up their goods in similarity to those of the plaintiffs and have thereby imitated the same and have passed off their goods as and for the goods of the plaintiffs?

(6) Is the use by the defendant of designs aforesaid such as to induce a belief in the public that the goods of the defendants are those of the plaintiffs?

(7) Has the registration by the defendants referred to in paragraph 20 of the written statement any and what legal validity or effect?

(8) Are the plaintiffs entitled to (1) an injunction, (2) delivery up of goods bearing the said designs and figures and (3) an account, or any and what damages?

Mr. *B. E. O'Conor* and Pandit *Krishna Narain Laghate*, for the plaintiff

Sir *Tej Bahadur Sapru*, Mr *P. N. Sapru* and Pandit *Rama Kant Malaviya*, for the defendant.

The case was tried by MEARS, C J , and MUKERJI, J., and their Lordships' judgement, after reciting the facts of the case as above, thus dealt with the issues framed :—

Issue No. 7 was considered first and decided in the negative.

Issues Nos. 1, 2 and 4 were decided in the affirmative.

As to the remaining issues the judgement was as below :—

Issues Nos 3, 5 and 6.

These three issues can conveniently be grouped together. The photograph, Exhibit 3, bearing the date the 19th of May, 1926, is a reproduction of the label and impressions used by the plaintiffs and the defendants respectively, the three impressions on the left being those of the plaintiffs and on the right those of the defendants. In examining them a disparity in the size of the ovals will be noticed. In fact the enlarged oval of the plaintiffs was selected for the photograph because the impression of No. 3 was faint Numbers 3 and 4 should be compared to show the slight actual difference in size between the ovals of the plaintiffs and defendants. Similarity being a matter for the court, we decided not to allow any evidence as to the opinion of witnesses on this question—vide section 45 of the Indian Evidence Act and *Payton & Co , Ltd.* v *Snelling Lampard & Co.* (1).

It will be noticed that the two top pictures are both of a lotus. It has been conceded by Mr. Kamlapat, the head of the firm the defendant No. 1, and the chairman of the board of directors of the defendant

(1) (1901) A C , 308

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No. 2, and by his son Mr. Padampat, one of the directors of the defendant No. 2, that their label (Exhibit D) does represent a kamal (lotus). The similarity between the two pictures at the top lies probably only in this that both represent a lotus. The two middle pictures, the two trefoils, are no doubt again similar, but with the difference that the defendants' picture on the right hand is a little more elongated than the plaintiffs' picture on the left. At the bottom are the two ovals. The similarity of the appearance is apparent. The difference is this that while the defendants' oval contains a rose branch with a flower the plaintiffs' on the left contains a lotus, and the defendants' pediment under the oval contains the word "phulchhap" in Hindi, while the plaintiffs' pediment on the left contains the word "kamalchhap" in Gujrati character. There is a difference in the letterpress also and there are similar differences in the letterpresses of the two sets of pictures above the ovals. Examples of the actual appearance of the cloths with the oval and trefoil of the plaintiffs and defendants respectively are shown by Exhibit K. P. 18 and Exhibit K. P. 19.

Before we consider the question of similarity and the question whether goods of a similar character bearing the defendants' impressions are likely or not to pass off as goods manufactured by the plaintiffs, it will be worth our while to examine the history behind the defendants' designs.

The plaintiffs say that their great volume of trade in Cawnpore, Calcutta, Delhi and elsewhere, but especially in Cawnpore, attracted the attention of Mr. Kamlapat, the proprietor of the firm Juggi Lal Kamlapat, and he determined to go into the cloth manufacturing trade and to enter into competition with them. To that the plaintiffs take no exception.

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Their case, however, is that the defendant firm sought to obtain and did in fact obtain an immediate market for their goods by a close imitation of their designs and that this was done intentionally and as part of a campaign of imitation.

The evidence shows that Mr Kamlapat and his family have been resident in Cawnpore for many years At some time in 1922 he decided on this new venture He erected mills and manufactured various kinds of cloth and garments and in particular cloth and garments closely approximating in quality and appearance to the five particular kinds by which practically the whole of the plaintiffs' trade in Cawnpore was built up and maintained Of this also the plaintiffs make no complaint, recognizing it as an every-day incident of trade

The evidence establishes that at first Mr Kamlapat used the design of a shrub in a flower pot. Shortly after he took the figure of the goddess Lakshmi, at times seated, at times standing.

Then on the 30th of June, 1922, he wrote to Messrs. Hate & Co., a firm of engravers and colour printers at Bombay, and wanted a quotation for a large number of labels. "The design is to be a lotus flower of dark red colour and the background should be the colour of water" A rough sketch was enclosed. After some immaterial correspondence, Messrs. Hate & Co. wrote on the 18th of July that the lotus design was the property of the Swadeshi Mills (the plaintiffs) and expressed regret that they could not copy or make another lotus design and requested Mr. Kamlapat to suggest any other design. Messrs. Hate had spoken of the lotus design having been "registered" by the plaintiffs, and Mr. Kamlapat, on the 21st of July, asked for "one ticket of that

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design for our inspection." In the witness-box Mr. Kamlapat admitted that he had seen the red and pink coloured lotus flower (Exhibit B) of the plaintiffs hundreds and hundreds of times before June, 1922. In reply Messrs. Hate are said to have sent the defendant the all blue label of a lotus flower which is a design very rarely used and then only on fancy and unbleached cloth. The sending of this blue label by Messrs. Hate rests upon the evidence of Mr. Kamlapat alone and it is curious that Hate should not have sent the usual dark red and pink label of the plaintiffs when it was owing to a request for a lotus of a dark red colour that they had raised objection. If in fact the blue label was sent, Mr. Kamlapat may have thought that the plaintiffs had failed to register the dark red and pink design, and, attaching some fanci d value to registration, may have thought he could steal a march upon the plaintiffs by adopting an imitation of it and "registering" it. However that may be, a fortnight later, Mr. Kamlapat sent to Messrs. Hate a design which was the copy from which was printed Exhibit D, the first of the alleged infringements, and the defendant firm and the defendant company have used between December, 1922, and December, 1925, no less than 605,310 of these coloured lotus labels on their goods and as can be seen by the figures, their sales immediately increased. Pleased as we believe him to have been with the success achieved by his coloured lotus label, he decided to stamp his goods with an oval and pediment and also with a trefoil design and on the 19th of July, 1923, he wrote to Messrs. Ganguli & Co., enclosing two sketches for blocks. Blocks were made and the impressions are No. 4 (the oval) and Exhibit G. In a letter of the 25th of July, 1923, Mr. Kamlapat directed the engravers that the line round the flower in the oval design should be

zigzag and this in our opinion is one instance amongst many in which in the preparation of the designs Mr. Kamlapat was making careful and calculated differences.

Neither the defendant firm nor the company kept any record of the particular kinds of cloth or garments on which one or other or both of these two marks were impressed, but it is not disputed that they were used on an immense number of goods, as the sales accounts establish.

Sir *Tej Bahadur Sapru*, who appeared for the firm, opened Mr Kamlapat's case along the only line which was possible. He said that Mr. Kamlapat knew that the plaintiffs had been doing business in Cawnpore for many years and was aware of their prosperity and was also familiar with the labels used by them, that "when he devised these things he believed and honestly believed that he had created designs with essential differences", that his designs were not calculated to deceive and that even assuming a remarkable similarity there was no reasonable likelihood that such designs would deceive

That was not at all the way in which Mr Kamlapat at the outset presented his own case and he was only driven into that position by cross-examination. He had previously been invited to study the 314 designs in the register of the Bombay Mill Owners' Association He went through them with care and agreed that, save for the plaintiffs' designs which were in the register, there was no design of a lotus flower or oval or trefoil or any design in any way resembling any of these three marks. We regret to have to say that Mr. Kamlapat showed himself an untruthful and dishonest witness. The following extracts from his evidence will demonstrate the dishonesty of his methods and of his evidence. He said that "a trade-mark

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does not help to sell goods at all," but he made the most important admission,—"since I began to use the coloured lotus flower my goods began to sell better." He said that before choosing his designs he had seen the plaintiffs' marks on their goods hundreds and hundreds of times, that he "determined" to have a lotus flower, that he knew the plaintiffs were selling goods in Cawnpore with the lotus label and that they were doing a large trade, about 200 lakhs in the years between 1914 and 1924. He gave several reasons for using the lotus, "I put the coloured lotus flower on for the sake of beauty In every case in which I use the coloured lotus flower . . . I do so because it is a pretty picture." He said it was a "pure accident" that his goods and those of the plaintiffs had an oval with pediment and a trefoil, and also an accident that they were placed in the same position on the goods of each and stamped in the same colour.

It was not until August, 1924, when he got the letter of complaint from the plaintiffs, that he "re-collected" that on his goods the marks were in the same order and were an oval with pediment underneath and a trefoil.

The "pure accident" theory was somewhat undermined by his subsequent admission that he "borrowed" the idea of the trefoil from plaintiffs' marks "from seeing it on plaintiffs' goods." He said he could give no "special reason" why he chose the oval with pediment and the trefoil. Eventually he brought himself more into agreement with the sensible line adopted by counsel in his opening.

In substance it came to this that he had intentionally copied the designs of the plaintiffs. "When I made all these differences which I have pointed out, I did think that the Swadeshi Mills would have no cause for complaint" . . . "We had made

differences in each design which we thought took away any imitation." Whilst being perfectly ready to give up the oval with pediment and the trefoil, he maintained his right to the use of the coloured lotus flower He concluded his evidence by saying " when I put my kamal flower on with its differences from the flower of the plaintiffs I knew there would be competition and that was my intention." " I think the differences I have made in Exhibit D when compared with Exhibit E are such that the law will allow me to use it " It will be noticed that on many of the cloths which have been exhibited there is the figure of the goddess Lakshmi which has been and is being widely used by the defendants. An illuminating incident occurred when the defendants put forward a coloured design (Exhibit K. P. 25) which on cross-examination was admitted by the defendant to be the mark of the Gujrati Spinning Mill, a firm of old standing " The coloured picture " he said " of theirs is identical with the picture I stamp on my cloth." (vide Exhibit P P. 3).

Mr Padampat, the son of Mr. Kamlapat and a director of the company, was called He is a man of high intelligence and was not prepared to agree with his father that a trade-mark was of no value. On the other hand he said that the coloured lotus flower was no doubt of very great commercial value to the plaintiffs, arising from its use year after year and the increasing volume of sales. Whilst he was willing to give up the oval and pediment and trefoil he objected to discontinue the use of the coloured lotus flower because they had used it on their goods since December, 1922, and it had become their trade-mark. When asked about the five classes of goods which it is alleged that the defendants particularly selected for competition with the plaintiffs he accepted the plaintiffs'

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figures of sale in Cawnpore from the 1st of July, 1922, to the 31st of March, 1926, as Rs. 10,345,293.

The effect of Mr. Kamlapat's evidence is quite clear. He intended to adopt the very valuable designs of the plaintiffs, and by careful examination and study evolved other designs of a like nature which he thought were such as the law would allow. That he did so with the object of obtaining part of the trade of the plaintiffs by passing off his goods as and for theirs, admits of no doubt. That he succeeded also admits of no doubt.

At some time or other he must have been advised that his only chance of retaining the valued coloured lotus flower was to jettison the oval and pediment and the trefoil. It was no doubt suggested, and it is no doubt hoped, that the court will say that there exist such differences in the coloured lotus pictures as to disentitle the plaintiff to relief on this branch of the case. In considering the English authorities we shall have to be extremely careful always to bear in mind that the percentage of illiteracy in this country exceeds 90 per cent. of the population and that English, Hindi and Gujrati characters convey nothing to the unlettered. This case comes up for decision at a moment when high hopes are being entertained of the development of India's great natural resources. For that purpose capital must be unlocked and some guarantee given that a business laboriously built up shall not be subject to invasion at the hands of an unscrupulous rival. As regards letterpress we think that the only present standard that can safely be set up is wholly to disregard differences of name and description in those trades where the article is sold in great quantities to the illiterate rural or urban population. Before we consider the cases, we should clear the ground by pointing out that, although the question

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was raised in the written statement as to how far the plaintiffs were entitled to an exclusive right to a trade-mark (vide issue No. 3), nothing was said in argument to show that the plaintiffs, by continuous use of the representation of a kamal, were not entitled to use the same and to stop the defendants from using it in a manner likely to prejudice the plaintiffs. It is not, therefore, necessary for us to cite any authorities in support of the well-known principle that in a country like India, where there is no statute for registering trade-marks, a right to a trade-mark is acquired by user. We take it, therefore, that the plaintiffs have a title to the trade-mark of a kamal or lotus and that the only question before us is whether the defendants are entitled to use their lotus or not. The first case cited by Sir *Tej Bahadur Sapru* is the case of *Blackwell* v *Crabb* (1) The head-note runs as follows —

" The Court will not restrain the use of a label on the ground of its general resemblance to the trade-mark of another manufacturer if it is different in points which a customer would look at in order to see whose manufacture he was purchasing "

The judgement is very short and was given on an interlocutory application for injunction to restrain the defendant from using the labels The Vice-Chancellor remarked that the case was to be decided by a mere inspection of two labels Then he proceeded to state that there were similarities and there were also great differences. It appears that the plaintiffs in the case were the well-known manufacturers of pickles and their case was that the defendant had got up a label similar to theirs in order to cut into their trade. Vice-Chancellor Wood proceeded to point out the differences in the two labels and then said :—

" The defendant's name is printed on his label at least as large as the plaintiffs' is on theirs The plaintiff's address is

(1) 36 L J Ch., 504

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on their label and there is no address on that used by the defendants "

As to the Royal Arms used by both the parties, he remarked that the use was common amongst trades-men. He added—

" Thus it is difficult to say where the imitation begins but the important question is what a customer is likely to look at The name is the thing which a customer would look at and this is conspicuously different "

The case proceeds on the true assumption that everyone wishing to buy the article would, by virtue of being able to read, at once see " Crabb and Company " conspicuously printed and would realize instantly that he was being offered a product of a firm other than that of Blackwell.

The next case cited was *Leather Cloth Company* v *American Leather Cloth Company* (1) The report of the case shows the two labels of the two contesting parties and a glance at them shows marked dissimilarity. After an examination of the two marks of the parties, one appreciates why their Lordships agreed that the decree of the court of appeal, dismissing the plaintiffs' suit, should be upheld. Lord CRANWORTH says at page 535 :—

" The defendant's trade-mark is certainly not the same as that used by the appellants. But is it only colourably different? I think it is so different as to make it impossible to say that it is substantially the same. No general rule can be laid down as to what is or is not a mere colourable variation. All which can be done is to ascertain in every case as it occurs whether there is such a resemblance as to deceive a purchaser using ordinary caution "

His Lordship then went on to describe the points of similarity and the points of dissimilarity and then remarked :—

" The name of the company is different. The word ' Crockett ' is prominently exhibited twice in the plaintiffs'

(1) (1865) 11 H L C, 523.

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upper half and once in the defendants'. No one taking the trouble to read the two can say that he would be deceived "

Again, in this judgement we see the emphasis laid upon the accepted fact of ability to read and the protection which literacy affords to the public As remarked by his Lordship, no general rule can be laid down as to what is or is not a mere colourable variation. In other words, the standards differ and education is one of the factors. Quite apart from inability to read, we are satisfied that most of the illiterates in this country are so untrained as to eye and brain in the reading and understanding of pictures that they would be quite unable to point out, for example, the differences in the two coloured lotus pictures of the plaintiffs and defendants even if put side by side before them and wholly unable to carry the essential characteristics of either of them in their mind They would know nothing more than that they wanted a cloth with a red coloured flower gummed or affixed to it. As illustrating the inability which villagers feel to look after themselves in towns and to carry through so simple a transaction as the purchase of a few rupees worth of goods it was proved by Kishan Chand Behan and referred to by other witnesses that a class of men by name Arhatia exist, who go out to the villages and collect 10, 20 or 50 people who want to make purchases He conducts these men to the town and takes them to the shops and helps them in their purchases. Bansi Dhar also spoke of villagers coming to his shop accompanied by commission agents or brokers. We were then referred to the *Singer Manufacturing Company* v *Loog* (1). In this case, it appears, the defendants had got up a sewing machine similar to that known as Singer's. The defendants were said to have endeavoured to obtain and to have succeeded in obtaining, for their

(1) (1882) L R , 8 App. Cas., 15

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machines, some of the reputation attaching to the plaintiffs' manufacture. The plaintiffs succeeded in their claim, in part The defendants had sold machines with a brass plate or label attached to them similar to the trade-mark of the plaintiffs. They were restrained from using the plaintiffs' trade-mark and there the litigation ought to have ended. But the plaintiffs objected to the use, by the defendants, of the very name " Singer " in certain advertisements and, before the House of Lords, the plaintiffs contended that the defendants should be restrained from using the name Singer in any way whatsoever. Their Lordships held that the use of the word " Singer " was in no way misleading and dismissed the appeal. It appears that the defendants compared their own machine with the Singer's, in the advertisements, and told the public in general that their machine was a better one and they also said that the system they had adopted was the " Singer System." It was held that no right of the plaintiffs had been infringed. Lord SELBORNE in his judgement said :—

> " The imitation of a man's trade-mark in a manner liable to mislead the unwary cannot be justified by showing either that the device or inscription upon the imitated mark is ambiguous and capable of being understood by different persons in different ways or that a person who carefully or intelligently studied it might not be misled."

Sir *Tej Bahadur* quoted from Lord BLACKBURN'S judgement to be found at pages 34 and 35 of the report, where his Lordship remarked that the defendant was not telling people that the machines sold by him were Singer's machines nor was he using a name similar to Singer's. The quotation was relied on to show that as the defendants were not using plaintiffs' name they were not liable. The comparison is not a good one. As we have pointed out, the names

stamped on the cloths serve in the vast majority of cases to convey no meaning at all. Even if the contrary be alleged, the defendants in the case before us did use the word "phulchhap" which had been used in connection with the plaintiffs' productions.

Boord and Sons v *Bagots* (1) was a case strongly relied on by the defendants. This case arose out of the respondents' application to register their trade-mark. The application was opposed by the appellants. The Comptroller-General, who heard the application, allowed it. There was an appeal to a single Judge who dismissed the application. The court of appeal reversed the judgement of NEVILLE, J., and an appeal was taken to the House of Lords The applicants were the manufacturers of a liquor and they adopted for their trade-mark a cat in boots on snow. The objectors had been using as their trade-mark for the liquor (gin) manufactured by them, a cat on a barrel. The question arose whether the use of the picture of a cat was likely to mislead anybody into purchasing defendants' liquor for that of the plaintiffs Lord BUCKMASTER, L. C., pointed out that, for certain reasons, gin was popularly known as " Old Tom " and that " Tom " came to be associated with the cat and that a cat was generally used as a symbol for gin His Lordship went on to remark (page 386) that no one could venture to say that one mark could reasonably be mistaken for the other It was conceded before their Lordships that it was impossible that any deception was likely to occur in the United Kingdom by the label adopted by the applicants. The question that their Lordships had to decide was whether the adoption of the label by the applicants was likely to injure the opponents' trade in the East His Lordship found that, in their

(1) (1916) 2 A.C., 382

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evidence, the witnesses for the appellants drew no distinction between the United Kingdom and other markets. Then his Lordship dealt with the argument that in the East people could not read and they purchased according to the mark the articles bore. In view of this argument he made observations which have been relied upon by the defendants. They are—

"The result of this evidence, therefore, establishes no more than this that the natives buy according to the mark and not according to the words and they look to the mark for the purpose of seeing what it is they buy. If they really look to the mark, deception is impossible, and the only way in which it could arise would be because people would ask for goods as the "cat" or "cat brand" goods and traders knowing that these phrases meant appellants' goods would deliberately supply goods that were not the appellants' simply because the label happened to bear the mark of a cat, though it was totally distinct from the cat which forms part of the appellants' device"

Then his Lordship further said:—

"I see no reason to attribute such conduct to the dealers nor the innocence to the consumers; and, if it occurred, the wrong done to the appellants would be one for which they would have to seek a remedy in the courts within whose jurisdiction the offence was committed. There is, to my mind, no reasonable probability of any such deception arising, nor will the registration of the mark place in the hands of the dishonest traders a ready means of furthering a course of deceit"

The question is how far these observations are applicable to this case To start with, it was conceded that no deception was possible in England. Then a purely hypothetical case was put before their Lordships. The applicants had not yet sent their goods to the eastern market for sale, and it was no part of the applicants' case that the defendants had recently and dishonestly copied their label. Further, Lord BUCKMASTER indicated that if any deception

was practised it would be for the court within whose jurisdiction the deception was practised to take cognizance of it and it was not for their Lordships to take cognizance of that sort of possible deception Every case of passing off must be decided on its own circumstances and no decision can be more than a guide as to the general principles to be applied. This case was followed up in the argument by that of *Payton & Co., Ltd.* v. *Snelling Lampard & Co.* (1) This case, as the note of the reporter points out, laid down no rule of law beyond this, that it is the function of the Judge to say whether two designs were similar and it was not for a witness to express an opinion on the point. In this case, the manufacturers of coffee, sold by them as "Royal Coffee" took exception to the get-up of the defendants' coffee sold as "Flag Coffee." Their Lordships were agreed that there was no similarity between the get-up and disagreed with the suggestion that when Royal Coffee was asked for Flag Coffee would be wrapped up in paper with intention to conceal its identity and fraudulently made over to a customer desirous of purchasing Royal Coffee. When once it is conceded that the get-up is not similar, nothing further need be said on the point. It is true that their Lordships remarked that the defendants could not be held liable for any fraud that might be practised by the retail sellers But this remark must be taken with the fact that there was no similarity between the two kinds of goods. Lord MACNAUGHTEN said :—

"In the first place the defendants did not, as it seems to me, pass off or attempt to pass off their goods as the goods of the plaintiffs. In the next place it is perfectly clear that no human being has been deceived. The third thing which is perfectly clear is that the plaintiffs' goods, if they have acquired a title in the market, the only title which they

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can have acquired is that of 'Royal Coffee' while as regards defendants' goods, if they have acquired or should acquire a title in the market, it is or will be the title of 'Flag Coffee'."

These remarks must be taken with reference to the facts of the case and cannot be detached from the facts to be applied to those of an entirely different case. Here, Mr. Kamlapat and the defendant company are not honest traders. They have deliberately stolen the plaintiffs' trade-marks, not one but three They have as regards the oval and trefoil intentionally used them in the same sequence. In doing this they have laid on themselves the burden of proving that their practice is not likely to deceive others. (*See* Sebastian's "Law of Trade-Marks," 5th edition, page 140, and the cases referred to therein as authorities)

The next case cited on behalf of the defendants was the case of *Birmingham Vinegar Brewery Company, Ltd* v. *Powell* (1). In this case the House of Lords affirmed the judgement of the court of appeal Their Lordships decided that the plaintiffs' manufacture, known as "Yorkshire Relish" had acquired a reputation, which went to indicate that the article bearing the name was of plaintiffs' manufacture, and held that under the circumstances it was not open to the defendant to call his manufacture "Yorkshire Relish," so as to induce purchasers into the belief that it was an article manufactured by the plaintiffs. This case in fact supports the plaintiffs, by reason of the circumstance that the plaintiffs' goods have acquired the name of "kamalchhap" and, therefore, the defendants have no right to use a "kamal" as their device or trade-mark in order to induce people to accept their goods as and for those of the plaintiffs.

(1) (1897) A C., 710

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Sir *Tej Bahadur Sapru* quoted the case of *Johnston* v. *Orr Ewing* (1) and tried to distinguish it. His first argument was that since this judgement was delivered the trend of authority had gone the other way and the present state of authorities must be inferred from two of the cases previously cited by him (viz., *Payton & Co., Ltd.* v *Snelling Lampard & Co.*, and *Boord and Sons* v. *Bagots*). We are clearly of opinion that such is not the case. We have tried to show that these two cases were decided on their peculiar facts and have no bearing on the present case. On the other hand, the case of *Johnston* v. *Orr Ewing* fully supports the plaintiffs' case and we have only to substitute the necessary names and descriptions of labels to make the judgement apply fully to the case before us. It appears that the plaintiffs had been selling yarn, dyed Turkish red, in the eastern countries with a device of two elephants with a banner between them. The defendants got up similar goods with a somewhat similar device and put them on the market. It was found that the defendants' device was in some respect dissimilar to the plaintiffs' device. The Lord Chancellor (Lord SELBORNE), however, made the following observations (page 225) :—

"But although the mere appearance of these two tickets could not lead anyone to mistake one of them for the other, it might easily happen that they might both be taken by the native of Aden or of India, unable to read and understand the language, as equally symbolical of the plaintiffs' goods."

It is impossible to state the contention of the plaintiffs in more appropriate words. In the case before the House of Lords no deception in fact had been proved, nor has any actual case of deception been proved in the case before us. But his Lordship

(1) (1882) 7 App Cas., 219.

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sought for an explanation, as we ourselves sought in this case, from the defendants as to why the defendants should have adopted the particular device of the plaintiffs. His Lordship says :—

"Nor am I able to conceive any satisfactory explanation, under all the circumstances of this case, of the adoption by the defendants of that particular device, two elephants at the upper corner of the ticket with a cloth banner suspended between them, knowing as they did the plaintiffs' ticket, knowing also the character and circumstances of the markets and entering as they did upon this particular branch of trade with the direct object of competing with and underselling the plaintiffs, unless it was because they had a desire and intention to approach to the plaintiffs' trade-marks as nearly as they possibly could. In such desire and intention no motive can be suggested except that of getting some part of the benefit of the goodwill and reputation of the plaintiffs."

The plaintiffs in this case have been doing a very large trade for a long time The magnitude of their business will be appreciated by the fact that from January, 1900, to December, 1922, the value of the goods manufactured by them was over 800 lakhs or about 5½ million pounds sterling. Their annual output is now nearly 80 lakhs of rupees and of this they have been selling goods in Cawnpore alone to the approximate value of 28 lakhs of rupees a year. The defendants started a mill and began to manufacture goods similar, at least in five instances, to those of the plaintiffs and began to mark them with some one or other of the plaintiffs' marks When the defendants adopted their design they knew that for years the plaintiffs had been selling, in the very market of Cawnpore, goods with their own particular design and they definitely modelled their marks upon those of the plaintiffs. No possible motive can be assigned for this conduct except an intention to cut into the trade of the plaintiffs and to misappropriate some of

it to themselves. The slight dissimilarity in the two lotuses is not in our opinion sufficient to give the defendants a right to retain and use it, especially in the view, which we reiterate and emphasize as a principal ground of our decision, that the letter-press, both of the plaintiffs and defendants, are meaningless symbols to all but an insignificant minority of purchasers.

In the case of *Seixo* v *Provezende* (1), Lord CRANWORTH said at page 196 .—

"I do not consider the actual physical resemblance of the two marks to be the sole question for consideration If the goods of a manufacturer, from the mark or device he has used, have become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much an invasion of right of that rival as the actual copy of his device "

The case before us exactly fits into the observation of his Lordship The plaintiffs have acquired a reputation on account of their trade-mark and the defendants have no right to adopt a trade-mark which can and will be described under the same name as that of the plaintiffs' goods

Several cases have been quoted on behalf of the plaintiffs to substantiate the proposition that no man has a right to pass off his goods, by adoption of similar devices, as the goods of another. The two cases previously referred to, *Johnston* v. *Orr Ewing* and *Seixo* v. *Provezende*, are enough to establish the plaintiffs' right to succeed.

We accordingly hold that the defendants have by the use of devices similar to those of the plaintiffs tried to pass off their goods as those of the plaintiffs and that the plaintiffs have an exclusive right to

(1) (1866) L.R , 1 Ch., 192

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their designs and figures and are entitled to restrain the defendants from selling goods with a colourable imitation of the plaintiffs' designs.

Issue No. 8.—It has not been controverted that the plaintiffs would be entitled to an injunction in case of the other issues being decided in their favour. It is equally clear that the plaintiffs are entitled to the delivery up of all the goods bearing designs and labels and figures similar to those of the plaintiffs, in order to have these devices and marks removed. The plaintiffs have given up their claim for an account. They ask for damages alone. The question is how are the damages to be estimated and what would be the amount of damages to which the plaintiffs are entitled?

The last question is not free from difficulty and the authorities on the point are not unanimous. The text-books (Sebastian, 5th edition, pages 253 and 254, Kerly, 5th edition, page 530, footnote) indicate that while in England the profits derived from the sale by the defendant of imitated goods have been taken to be the measure of damages to which the plaintiff is entitled, in America the plaintiff has been awarded the profits which he would have realized if he had sold the quantity of goods shown to have been sold by the defendant. We are of opinion that the profits made by the defendant cannot always be a true criterion of damages awardable to a plaintiff.

Unless a rival trader commences his career, as did the defendant, by appropriating the trade-marks of other firms, there must always be an initial period during which the goods have to acquire by their own merit, by advertisement and "drive" a footing in the market Goodwill has also to be built

up. Time and money too are lost, through lack of experience, as was undoubtedly the case with the defendants, who at the outset manufactured one class of goods which were to a large extent unsaleable.

The plaintiffs proved a very moderate figure of all-round profit which they showed to be just over 9 per cent. Both parties were anxious to avoid an account, as it would in the circumstances have been almost impossible to dissect the various classes of goods manufactured by the defendants and to apportion the profits to those bearing the infringing marks. Moreover, if the inquiry was to be held on the basis of general all-round profit, there would have arisen the question as to whether anything like 27 lakhs had been spent by the defendants on the establishment of the business.

That the defendants have succeeded materially in cutting into the plaintiffs' trade is clear. By consent, all the documents filed by the parties are to be treated as "admitted subject to all just exceptions" and the figures furnished by them are to be treated as correct. The plaintiffs' figures of sale of goods in Calcutta show a steady increase (Exhibits B D. 3 and B D 4) till the highest point was reached in 1924. The next year's sale shows a marked decline, from 58 lakhs to 37 lakhs. The same is the case with the Cawnpore figures, Exhibit B D. 2. In nine months ending the 31st of March, 1926, the plaintiffs sold goods worth only 17 lakhs, while the sale during the previous twelve months was 30 lakhs.

The particular articles in which the defendants directly competed with the plaintiffs and on which they put one or more of the infringing marks were suti, salita, chaddar, markin and dhotis.

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The defendants, in the short period of some three years, sold goods so marked to the value of no less than Rs 32,00,828. We believe that we are acting generously to the defendants in assuming that if these goods had borne the flower pot stamp or the Lakshmi design, they would have sold 40 per cent. of the total quantity. We think that this is a figure with which a jury of businessmen might fairly start, and that they might reasonably and properly give to the plaintiffs damages at the rate of 9 per cent. upon the remaining balance of 60 per cent.

On this basis, taking the round figure of sales at 32 lakhs, the damages come to Rs. 1,72,800. The actual apportionment of the damages is not a matter of practical importance, because the firm was the property of the Hindu family of which Mr. Kamlapat was the head and that same family hold in the company shares of the value of nearly 26 lakhs out of a capital of 27 lakhs. As the defendants' accounts do not show how much of the 32 lakhs was received by Mr. Kamlapat and by the company respectively, we propose to apportion the damages according to the extent of business done by each defendant. These figures, over the relevant periods, are roughly Rs. 47,00,000 and Rs. 34,00,000, and so, as between the two defendants, the damages may be divided in the proportion of 47 and 34. On that basis the liability of the first defendant would be Rs. 1,00,265 and that of defendant No. 2 Rs. 72,535. These are, no doubt, considerable sums of money, but damages are in every case proportioned to the injury done, and we are satisfied that the defendants respectively made at least the amount of profit in which we are casting them in damages.

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We, therefore, grant a perpetual injunction restraining the defendants, their servants and agents from placing upon goods of their manufacture and from selling any cloth or individual garments to which there is affixed or stamped or otherwise applied any label or design which colourably imitates—

(i) The coloured Lotus Flower (Exhibit E).

(ii) The oval (No 3).

(iii) The trefoil (Exhibit F).

In view of the immense quantity of goods in the possession of the defendants, which bear one or more of the infringing marks and of the practical difficulties attendant upon requiring these goods to be delivered to an officer of this Court, we (with the consent of counsel for the plaintiffs) order the defendants to remove or erase each and all of the said infringing marks from all cloths and individual garments in their possession. This work is to be completed by the 17th of July, 1926, on or before which date Mr. Kamlapat and his son Mr. Padampat are to make a joint affidavit stating that this has been done and expressing their willingness to give the plaintiffs or an officer of this Court inspection of their goods at their premises should the plaintiffs so desire If this is done, an order for delivery up of the goods for the purpose of removal and erasure of the offending marks may be avoided. The defendants are to deliver within fourteen days to the Registrar of this Court the remaining balance of 262,590 coloured lotus flower labels now in their possession. Defendant No. 1 is to pay the plaintiffs Rs. 1,00,265 by way of damages, and defendant No. 2 is to pay to the plaintiffs the sum of Rs. 72,535 damages The decree in favour of the plaintiffs, with respect to the

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amount of damages, will be subject to their making good the deficiency in court fee, within thirty days of the office report declaring what amount is due from them. In case of failure to pay the court fee, the amount of damages, payable by the two defendants together, will be limited to the sum of Rs 25,000 as claimed in the plaint. This amount will be payable by the defendant No. 1 and the defendant No. 2 in the proportion of 47 and 34. The defendants will pay the costs of this action which will include the costs of commissions, and, in this Court, counsel's fees; and interest is to be calculated on the damages at the rate of 6 per cent. as from the 1st of January, 1926, until payment

Suit decreed.

REVISIONAL CRIMINAL

Before Mr Justice Pullan

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July 13

EMPEROR *v.* MAHABIR PRASAD

Criminal Procedure Code, sections 423, 237 *and* 238—*Charge of principal offence and conviction for abetment —Powers of appellate court to alter conviction.*

It is not open to a court to find a man guilty of abetment of an offence on a charge of the offence itself. The only section under which an appellate court can alter the finding and base a conviction for abetment is section 423 of the Code of Criminal Procedure. But this section must be read with sections 237 and 238 of the Code. Abetment not being a "minor offence," section 238 will not apply, and it can only come under section 237 if there is no element in the abetment which is not included in the charge.

* Criminal Revision No. 346 of 1926, from an order of J. Allsop, Sessions Judge of Aligarh, dated the 20th of May, 1926

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Reg. v *Chand Nur and Pirbhai Adamji* (1), followed. *Yeditha Subbaya* v *Emperor* (2), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Mr. *K. O. Carleton*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

PULLAN, J.:—This is an application for revision of an order of the Sessions Judge of Aligarh convicting one Mahabir Prasad of the offence of abetment of burglary. Mahabir Prasad, who is a post office clerk, was charged along with another person with committing burglary at the Aligarh post office and stealing a sum of about Rs 14,000 Both were found guilty by the Assistant Sessions Judge and Mahabir Prasad appealed to the Sessions Judge. The latter found that it was not proved that Mahabir Prasad took part in the burglary, but he convicted him of abetment of the offence. Put briefly, the view taken by the learned Sessions Judge is that Mahabir Prasad used his position in the post office to obtain the keys of the safe and strong room and had duplicates made which were used by the burglar or burglars to enter the office at night and remove this large sum of money.

It was laid down by the Bombay High Court, as far back as the year 1874, in the case of *Reg* v. *Chand Nur and Pirbhai Adamji* (1), that it is not open to a court to find a man guilty of abetment of an offence on a charge of the offence itself. The only section under which the appellate court can base a conviction for abetment is section 423, Criminal Procedure Code. This section empowers an appellate court to alter the finding and maintain the sentence But

(1) (1874) 11 Bom H.C.R., 240. (2) (1912) 23 M L J., 722

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this section must be read with sections 237 and 238 of the Code. Section 237 deals with a case where the offence has been wrongly described in the charge sheet and section 238 deals with a case where a court finds that the major offence of which the accused has been charged has not been brought home to him but a minor offence has been proved. Abetment is not a minor offence, and it can only come under section 237 if there is no element in the abetment which is not included in the charge. The learned Assistant Government Advocate attempts to support the order of the Sessions Judge in this case by referring to a ruling of the Madras High Court, *Yeditha Subbaya* v. *Emperor* (1), but this ruling does not in any way assist the case set up for the Crown, on the contrary, the judgement of the Bombay High Court, to which I have already referred, is carefully considered and followed by the Madras High Court in this very case. As the learned Judge observes

"Ordinarily, the facts required to prove the abetment should not be included in the facts constituting the principal offence

The abetment, therefore, would be complete before the principal offence is committed."

The principle underlying these rulings is that no man should be convicted of an offence on a charge which he has not had an opportunity of answering. In the present case Mahabir Prasad was never charged with abetting the commission of this burglary by obtaining duplicate keys, and although the trial court went into this question in detail, it did so merely in order to use this circumstance as proof that the accused took part in the burglary: but now that the lower court has held that the accused did not take part in the burglary, the finding that he

(1) (1912) 23 M L J, 722

abetted the offence before its commission by obtaining duplicate keys is contrary to law. 1926

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[His Lordship then considered, on the evidence, whether a re-trial should be ordered, and the judgement thus concluded :—]

I do not consider that on this evidence I should be justified in ordering a re-trial, for had the case come before me in appeal it is not improbable that the accused would have been acquitted. I, therefore, allow this application, set aside the conviction and sentence passed upon the accused and order that he be set at liberty The fine, if paid, will be returned to him

Application allowed

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr Justice Sulaiman, Mr. Justice Daniels, Mr Justice Mukerji and Mr Justice King

RAM REKHA SINGH AND OTHERS (PLAINTIFFS) *v* GANGA PRASAD MUKARADDHWAJ AND OTHERS (DEFENDANTS).* 1926 *July*, 27

Hindu law—Joint Hindu family—Mortgage—Previous mortgage renewed in favour of same mortgagee—Previous debt set off in subsequent deed—"Antecedent debt."

Where a previous mortgage-deed of joint family property is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one, the alienation can be deemed to be in lieu of an "antecedent debt" so as to be binding on the sons, unless they can establish immorality or illegality

* Second Appeal No 116 of 1924, from a decree of H Beatty, District Judge of Ghazipur, dated the 13th of October, 1923, confirming a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 28th of February, 1923

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Whenever a previous debt is set off in a subsequent mortgage-deed, the true test to apply, in order to ascertain the antecedency of the debt, is whether the first debt was independent of the second The two transactions must be dissociated in time as well as in fact. *Brij Narain* v. *Mangal Prasad* (1), *Suraj Bunsi Koer* v. *Sheo Persad Singh* (2), *Muddun Thakoor* v. *Kantoo Lall* (3), *Nanomi Babuasin* v *Modhun Mohun* (4), *Badri Prasad* v. *Madan Lal* (5), *Chandradeo Singh* v. *Mata Prasad* (6), *Sahu Ram Chandra* v. *Bhup Singh* (7), *Chet Ram* v *Ram Singh* (8), *Gauri Shankar Singh* v *Sheonandan Misra* (9) and *Lal Bahadur* v *Ambika Prasad* (10), referred to.

THE facts of this case were as follows :—

The great-grandfather and the grandfathers of the plaintiffs executed a mortgage-deed of joint family property in 1889 in favour of the ancestor of the contesting defendants The present plaintiffs were not then born but the fathers of the plaintiffs were alive and did not join in the deed. Between 1889 and 1910 three of the plaintiffs were born and by birth acquired an interest in the family property. Before the period allowed by section 31 of the Limitation Act of 1908 expired, the fathers of the plaintiffs acting for themselves and as guardians of their minor sons, jointly with the uncle and the grandfather of the plaintiff No. 3, executed a fresh mortgage-deed of the same property in favour of the same mortgagee and in lieu of the bulk of the amount due on the previous document, the remaining portion being remitted. In 1920 the mortgagees sued on the last mentioned mortgage, impleading the present plaintiffs under the guardianship of their respective fathers The other adult members

(1) (1923) I L R , 46 All , 95.
(2) (1878) I L R , 5 Calc., 14.
(3) (1874) L R , 1 I A , 333
(4) (1885) I.L.R , 13 Calc., 21.
(5) (1893) I L.R., 15 All., 75
(6) (1909) I L.R , 31 All., 176.
(7) (1917) I L.R , 39 All , 487.
(8) (1922) I.L.R , 44 All., 368.
(9) (1924) I L R , 46 All , 884
(10) (1925) I.L.R., 47 All., 796.

of the family were also impleaded. No one contested the suit and an *ex parte* decree for sale was passed, which was subsequently made absolute. The plaintiffs now sued for a declaration that the decree of 1920 was not binding on them as they were not properly represented. They alleged that the mortgage debt was without any legal necessity and, therefore, not enforceable against the family property. Both the courts below dismissed the suit. The plaintiffs appealed.

In view of a difference of opinion as disclosed by certain unreported rulings, the appeal was referred to a Full Bench.

Dr. *Kailas Nath Katju* (for Pandit *Ambika Prasad Pande*), for the appellant.

Munshi *Kamla Kant Varma*, for the respondents.

The judgement of the Full Bench (WALSH, A. C. J., and SULAIMAN, DANIELS, MUKERJI and KING, JJ.), after stating the facts as above, thus continued :—

Assuming that there have been such irregularities in the appointment of the guardians *ad litem* in the previous suit as to entitle the plaintiffs to reopen the question, they cannot by merely showing irregularities succeed, unless they can satisfy the court that they have been prejudiced and have been deprived of some good defence which was open to them The respondents' position is that the mortgage of 1910, being in lieu of the amount due on the previous mortgage of 1889, was in lieu of an antecedent debt of the fathers and grandfathers of the plaintiffs and is binding on them, even though no legal necessity for the advance of 1889 be shown. In the alternative

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they maintain that the debt of 1889 was in itself good and binding on the family

The main point which arises for the consideration of the Full Bench is whether, where a previous mortgage-deed is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one, the alienation can be deemed to be in lieu of an "antecedent debt" so as to be binding on the sons unless they can establish immorality or illegality. The answer to the question depends on the interpretation of the authoritative pronouncement of their Lordships of the Privy Council in the case of *Brij Narain* v. *Mangal Prasad* (1). Before discussing this case it seems desirable to point out what was understood by the expression "antecedent debt" in a few previous leading cases.

The expression "antecedent debt" does not find any place in the Hindu Shastras. The courts, however, have made the pious obligation of the sons to pay their fathers' debts the ground for the doctrine of antecedent debts In the case of *Suraj Bunsi Koer* v *Sheo Persad Singh* (2), Sir J. COLVILLE, in delivering the judgement of their Lordships of the Privy Council, laid down that the earlier case of *Muddun Thakoor* v *Kantoo Lall* (3), was an authority for the proposition, among others that—

"where joint ancestral property has passed out of a joint family either under a *conveyance executed by a father in consideration of an antecedent debt*, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts, cannot recover that property, unless they show that the debts were

(1) (1928) I.L.R., 46 All., 95 (2) (1878) I.L.R., 5 Calc., 148 (171).
(3) (1874) I.R., I.A., 233

contracted for immoral purposes and that the purchasers had notice that they were so contracted "

Later on, in the case of *Nanomi Babuasin* v. *Modhun Mohun* (1), Lord HOBHOUSE remarked that

" the decisions have for some time established the principle that the sons cannot set up their rights against their father's *alienation for an antecedent debt*, or against his creditors' remedies for their debts, if not tainted with immorality "

Quoting the passages in the last mentioned cases, Sir JOHN EDGE in delivering the principal judgement of the Full Bench, with which the other four learned Judges agreed, in *Badri Prasad* v. *Madan Lal* (2), held that the passages in his opinion showed that the expression "antecedent debt" is not to be restricted to a prior debt due to a person other than the purchaser or mortgagee, and that the Hindu sons were bound by a mortgage executed by their father alone, the consideration having been, with a trifling exception, money advances antecedently made by the mortgagee to him

Similarly, in the Full Bench case of *Chandradeo Singh* v *Mata Prasad* (3), Sir JOHN STANLEY, C. J., in expressing the view of the majority, remarked:

" The true rule is that a son cannot impeach an alienation of ancestral joint family property made by a father, *for which the consideration is an antecedent debt of the father* not tainted with immorality or the object of which is to pay such a debt "

This passage was quoted with approval by Lord SHAW in *Sahu Ram Chandra* v *Bhup Singh* (4) In this last mentioned case a mortgage had been granted for Rs. 200 advanced at the time and on the faith of it. Nevertheless it was boldly contended

(1) (1886) I.L.R., 13 Calc., 21 (35) (2) (1893) I.L.R., 15 All., 75 (80).
(3) (1909) I.L.R., 31 All., 176 (199) (4) (1917) I.L.R., 39 All., 497 (449).

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that the transaction substantially was that the father got Rs. 200 into his hands and that when subsequently he granted the mortgage he was accordingly "an antecedent debtor." This contention was repelled by their Lordships and it was held that "in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact." There were, however, passages in the judgement indicating that "the joint family estate could not be transferred so as to bind the sons except where the transfer has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate, or the security afforded or supposed to be available by such joint estate." These passages were the basis of the decision in *Chet Ram* v. *Ram Singh* (1), and gave rise to a conflict of opinion in India The recent pronouncement of their Lordships in the case of *Brij Narain* v. *Mangal Prasad* (2), was an authoritative pronouncement intended to set such conflict at rest. It was pointed out that in *Sahu Ram Chandra's* case the incurring of the debt was the creation of the mortgage itself and that there was no antecedency either in time or in fact. At page 101 it was remarked that "the family estate may become liable by being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought": and at page 102 it was said that "it seems to have been felt that if the debt for which a mortgage was given, was, *in any proper sense, antecedent*, then it, so to speak, escaped the direct infringement of the

(1) (1922) I.L.R., 44 All., 368 (2) (1923) I.L.R., 46 All., 95

principle that the father manager could not burden the estate except for necessity." The fourth proposition laid down by their Lordships at page 104 was as follows —

> "Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached."

It is significant that their Lordships do not say that the two debts must be absolutely independent of each other, or wholly unconnected with each other. All that is said is that the previous debt, in order to be antecedent debt, should be truly independent and not part of the subsequent transaction. This is quite different from saying that the latter debt should be unconnected with the earlier one. Whenever a previous debt is set off in a subsequent mortgage-deed, the second deed is in one way connected with the first, and one might in one sense say that the second is not independent of the first. But the true test to apply is whether the first one was independent of the second. We think that what their Lordships meant to lay down was that the two deeds must not be part and parcel of the same transaction, but that they must be distinct and separate not only in point of time but in reality. There must be dissociation in time as well as in fact. If at the time when the earlier mortgage transaction was entered into the later one was not even in contemplation, the first will be independent and will remain an antecedent debt, even though it be set off in the second document and even though both be in favour of the same mortgagee. If this were not the true interpretation, the whole effect of the ruling of their Lordships would be nullified. It seems to us that their Lordships have affirmed the view expressed by

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STANLEY, C. J., in the Full Bench case of *Chandradeo Singh* v. *Mata Prasad* (1), where the learned CHIEF JUSTICE remarked :—

"By the expression 'antecedent debt' I understand a debt which is not for the first time incurred at the time of a sale or mortgage, that is, presently incurred, but a debt which existed prior to and independently of such sale or mortgage. It must be a *bonâ fide* debt not colourably incurred for the purpose of forming a basis for a subsequent mortgage or sale or other similar object."

We do not think that the mere fact that the mortgage is a renewal of the earlier mortgage in favour of the same mortgagee would make any difference. If that were so, then an old debt, which would be an antecedent debt if it were paid off by a deed in favour of a third person, would cease to be so if paid off by a deed in favour of the same mortgagee. It is difficult to see how on principle the personality of the subsequent creditor can necessarily make any difference. Of course if the former debt were a mere device and were incurred merely for the sake of creating an antecedency in time and with a view to support a subsequent transfer, the liability could not be upheld. In the present case, however, there can be no such suggestion as the two deeds are separated by a long distance of time.

In the case of *Gauri Shankar Singh* v. *Sheonandan Misra* (2), a previous mortgage debt, on which the personal remedy had become barred by time, but not the remedy of the enforcement of the charge, was held to be a good antecedent debt so as to support a subsequent possessory mortgage in favour of the same mortgagee.

The view that property can be transferred to a creditor in lieu of a previous debt due to him is

(1) (1909) I.L.R., 31 All., 176 (190) (2) (1924) I.L.R., 46 All., 384

further supported by the recent case of *Lal Bahadur* v. *Ambika Prasad* (1), decided by their Lordships of the Privy Council. In that case two previous mortgages of 1895 were held to be " antecedent debts " which would justify for their liquidation a sale of family property in favour of purchasers who were, one, some, or all nominees of the mortgagee.

We are accordingly of opinion that the mortgage of 1910 was in lieu of an antecedent debt due from the plaintiffs' fathers and grandfathers and was, therefore, binding on the plaintiffs. The plaintiffs were, therefore, in no way prejudiced by the previous decree. The appeal is accordingly dismissed with costs

Appeal dismissed

REVISIONAL CRIMINAL.

Before Mr Justice Banerji

EMPEROR *v* ATMA RAM AND OTHERS *

1926 *October*, 7.

Act No XLV of 1860 (*Indian Penal Code*), *section* 323—*Criminal Procedure Code, section* 106—*Security to keep the peace—Summary trial—Notes of evidence not kept.*

Where a magistrate trying a case summarily made some notes of the evidence given but destroyed them : *held* that this was a sufficient cause for setting aside the conviction

Held also, that a magistrate having convicted an accused person under section 323 of the Indian Penal Code cannot bind him over to keep the peace under section 106 of the Code of Criminal Procedure unless he also finds that the offence was one involving a breach of the peace. *Amuddi Sheikh* v *Queen-Empress* (2), *Satish Chandra Mitra* v *Manmatha Nath Mitra* (3) and *Muhammad Rahim* v. *Emperor* (4), referred to.

* Criminal Reference No 526 of 1926.

(1) (1925) I.L.R., 47 All, 795 (2) (1900) I.L.R., 27 Calc., 460
(3) (1926) I.L.R., 48 Calc., 280. (4) (1925) 23 A.L.J., 1058

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This was a reference made by the Sessions Judge of Meerut.

THE facts of the case are fully stated in the Sessions Judge's order which was as follows:—

This is an application for revision of an order of Mr. Piari Lal, first class Special Magistrate of Meerut, convicting the applicants under section 323 of the Indian Penal Code and sentencing them to a fine of Rs. 25 each and also ordering them to execute a bond in Rs 100 each to keep the peace for one year.

Only two points are urged in revision. The first is that the Magistrate tried the case summarily, but he did not record any notes of evidence or, at any rate, did not preserve any notes of evidence on the record. The second is that the order passed under section 106 of the Code of Criminal Procedure is illegal.

Now, with regard to the first point, the Magistrate himself says that he did make some notes of the evidence of the witnesses for his own information, but he did not preserve these notes and keep them on the record. He says he was not required to do so. Now there can be no doubt that a certain number of witnesses were examined in this case, but it does not appear from the judgement as to who these witnesses were There is a reference to the evidence of three witnesses only, but the names of two are not disclosed The name of the only witness which is disclosed in the judgement is Dr Murari Lal He must have examined the injuries of one of the complainants. There is, therefore, nothing in the judgement itself which could show what the evidence of these witnesses was and, as admitted by the learned Magistrate, there are no notes of evidence kept on the record. So far it is clear But it is contended on behalf of the applicants that although the object of a summary procedure is to shorten the course

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of a trial it is nevertheless incumbent on the Magistrate to put on record sufficient evidence to justify his order. In support of this contention reliance is placed on *Ainuddi Sheikh* v. *Queen-Empress* (1). It is also contended that if at the commencement of the trial the Magistrate is unable to determine whether the proper sentence to be passed should be an appealable one or not he must make a memorandum of the substance of the evidence of each witness as his examination proceeds. It is further urged that if he actually does so, the notes of the evidence must form part of the record of the case and cannot be destroyed by him. And it is lastly contended that where the Magistrate does record the evidence but subsequently destroys the notes the conviction must be set aside. In support of this contention reliance is placed upon *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (2). In my opinion these rulings should be followed, especially when there is no ruling to the contrary of the High Court of Allahabad. I, therefore, hold that the destruction of the notes of evidence has rendered the conviction improper.

With regard to the second point the case of the applicants is clear It was a case under section 323 of the Indian Penal Code and it arose simply on account of a sudden altercation over a trivial matter. Now section 323 of the Indian Penal Code is not an offence referred to in section 106 of the Code of Criminal Procedure, but even then an order can be passed after a conviction under this section if it was found by the Magistrate that the offence involved a breach of the peace But there must be a finding of the Magistrate; otherwise his order is not justified. In *Muhammad Rahim* v. *Emperor* (3) it was laid down that an order under this section can only be passed when in a case of causing simple hurt a breach of the peace is involved.

(1) (1900) I L R, 27 Calc, 150 (2) (1920) I L R, 46 Calc, 280
(3) (1925) 23 A L J, 1053

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It was also held that the Magistrate cannot merely on the ground that the parties were on bad terms bind the accused down. Under these circumstances I hold that the order passed under section 106 of the Code of Criminal Procedure is not legal

I, therefore, submit this case to the Hon'ble High Court with a recommendation that the conviction of the applicants under section 323 of the Indian Penal Code and the order under section 106 of the Code of Criminal Procedure both be set aside and such further orders may be passed by the Hon'ble Court as are deemed fit. The record shall be submitted to the Hon'ble Court after the explanation, if any, of the Magistrate concerned is received.

Babu *Sailanath Mukerji*, for the applicant

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

BANERJI, J.—I accept the reference. It is unnecessary to order a re-trial. The fines, if paid, will be refunded

Reference accepted.

MISCELLANEOUS CIVIL.

Before Mr Justice Iqbal Ahmad.

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October, 19

AHMADI BEGAM (PLAINTIFF) *v* GIRRAJ KISHORE (DEFENDANT) *

Act No IX of 1887 (Provincial Small Cause Courts Act), schedule II, article 8—Small Cause Court—Jurisdiction —" House-rent "

Held that the term " house-rent " as used in article 8 of the second schedule to the Provincial Small Cause Courts Act, 1887, is not confined to the rent of a dwelling-house, but

* Miscellaneous Reference No 571 of 1926, from Harnath Prasad Ashthana, Munsif of Mainpuri, exercising the powers of a Small Cause Court Judge

includes also the rent of a shop. *Babu Lal* v *Bhawani Das* (1) and *Nga Kan* v *Mi Mya* (2), followed.

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THE facts of this case sufficiently appear from the judgement of the Court

The parties were not represented.

IQBAL AHMAD, J. :—This is a reference by the Small Cause Court of Mainpuri under order XLVI, rule 6, of the Code of Civil Procedure. The point for determination is whether a suit for the recovery of rent for the occupation of a shop is a suit for the recovery of house-rent within the meaning of article 8 of the second schedule to the Provincial Small Cause Courts Act, and as such exempted from the cognizance of a court of small causes. The learned Judge is inclined to the view that the word "house-rent" in article 8 means rent of a building used as a dwelling-house only and does not include the rent of a shop. I am of a contrary opinion.

If the Legislature wanted to use the word "house" in the said article in the restricted sense in which the learned Judge making the reference thinks it was used, then the Legislature could easily have indicated its intention by qualifying the expression "house" by the word "dwelling." The absence of any such qualifying word leads one to the conclusion that the word "house" was used in its widest possible sense as meaning a building that is adapted or may be adapted for residential purposes.

The fact that the word "house" has not been used in a restricted sense in the Small Cause Courts Act in article 8 is also shown by a consideration of the provisions of clause (v) of section 7 of the Court Fees Act. By section 7 of the Court Fees Act the court-fee payable in respect of particular classes of

(1) (1912) 9 A.L.J., 776 (2) (1909) 4 Indian Cases, 822

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suits has been provided for, and by clause (v) provision is made for suits for possession of "land, houses and gardens." There also the word "houses" has been used as including buildings of every description, for there is no provision anywhere in the Act prescribing any particular amount of court-fee with respect to suits for possession of shops as distinguished from houses If the Legislature wanted to distinguish shops from houses one would have expected some provisions being made in the Court Fees Act for suits for possession of shops as distinguished from houses.

A reference to pages 401 and 402 of volume 23 of Halsbury's "Laws of England" will show that the word "house" has been used in the English Statutes as meaning not only dwelling-houses but including schools, factories and other buildings in which persons are employed.

The fact that the word "house" used in article 8 includes a shop is also deducible from the observations of Mr. Justice PIGGOTT in the case of *Babu Lal* v *Bhawani Das* (1). Then there is the decision of the Upper Burma Judicial Commissioner's Court in *Nga Kan* v *Mi Mya* (2) in which it has been held that a stall in a market is a house and a suit to recover rent for the occupation of a stall is a suit for recovery of house-rent within the meaning of clause 8 of schedule II to the Provincial Small Cause Courts Act and, therefore, cognizable by the Court of Small Causes The learned Judicial Commissioner in that decision has exhaustively set forth the meaning assigned to the word "house" in the various dictionaries referred to by him in his judgement and I entirely agree with that decision.

My answer to the reference, therefore, is that the word "house-rent" in article 8 is wide enough to

(1) (1912) 9 A L J , 776 (2) (1909) 4 Indian Cases, 822.

include the rent of a shop and that the suit filed by the plaintiff in the Small Cause Court has been filed in the proper court Let the record be returned.

Record returned

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AHMADI BEGAM v GIRRAJ KISHORE

APPELLATE CIVIL.

Before Mr Justice Dalal and Mr Justice Pullan.

BINDESHRI BAKHSH SINGH (DEFENDANT) *v* CHANDIKA PRASAD AND ANOTHER (PLAINTIFFS) * 1926 *October*, 20

Minor—Bond executed by a minor—Attempted ratification after attainment of majority

A person who has executed a bond whilst a minor cannot, when he attains majority, by executing a second bond of similar purport, ratify or confirm the former bond

Indian Ramaswami Pandia Thalavai v *Appapa Chettiar* (1) and *Arumugam Chetti* v *Duraisinga Tevar* (2), followed. *Kundan Bibi* v *Sree Narayan* (3), dissented from *Greyson* v *Raja Sri Sri Aditya Deb* (4), distinguished

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Uma Shanker Bajpai*, for the appellant

Pandit *Jagjiwan Nath Takru*, for the respondents.

DALAL and PULLAN, JJ —The two lower courts have concurred in finding that the whole amount contained in a mortgage bond dated the 19th of September, 1914, is due to the plaintiff from Bindeshri Bakhsh Singh, who is the appellant before us. We are only concerned with the lower court's decision on

* Second Appeal No 264 of 1924, from a decree of F. L. Yorke, dated the 24th of March, 1923, confirming a decree of Tirloki Nath, Subordinate Judge of Allahabad, dated the 20th of May, 1922

(1) (1906) 16 M.L.J., 422
(2) (1911) I.L.R., 37 Mad., 28
(3) (1906) 11 C.W.N., 135
(4) (1889) I.L.R., 16 I.A., 221

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this point. It is admitted that the consideration for that bond included an item of Rs. 510 due on a bond of the 7th of February, 1914, and that on that date the executant Bindeshri Bakhsh Singh was a minor. It is contended that a minor is not competent, on attaining majority, to execute a fresh bond ratifying, as it were, a bond executed by him during his minority. The lower courts held otherwise, relying on a ruling of the Calcutta High Court in the case of *Kundan Bibi* v. *Sree Narayan* (1) But we are asked to consider that that ruling is not good law. All transactions entered into by a minor are void. Consequently the bond entered into on the 7th of February, 1914, must be held to have been without any consideration, and the minor when he attained majority could not take upon himself a liability, which, from the point of view of law, never really existed.

We have been shown two rulings of the Madras High Court in the case of *Indran Ramaswami Pandia Thalavar* v. *Anthappa Chettiar* (2) and the case of *Arumugam Chetti* v *Duraisinga Tevar* (3), in which the matter has been discussed at length, and we are of opinion that we should follow the view taken by the Madras High Court and not that of a single Judge of the Calcutta High Court cited above.

In reply we have been referred to a ruling of their Lordships of the Privy Council in the case of *Gregson* v *Raja Sri Sri Aditya Deb* (4), but there is an essential difference between the decision of their Lordships and the case before us, for they were considering, not the case of a minor, whose transactions are void, but the case of a disqualified proprietor whose transactions were voidable.

(1) (1906) 11 C.W.N., 135
(2) (1906) 16 M.L.J., 422
(3) (1911) I.L.R., 37 Mad., 38
(4) (1889) L.R., 16 I.A., 221

We are of opinion, therefore, that the sum of Rs. 510 must be excluded from the amount due under the bond of the 19th of September, 1914, and to this extent we allow this appeal, with proportionate costs.

Appeal allowed.

Before Mr Justice Lindsay and Mr. Justice Sulaiman.

SHIAM LAL (PLAINTIFF) *v* DWARKA PRASAD AND OTHERS (DEFENDANTS).*

1926 *October*, 21.

Act (Local) No XI of 1922 *(Agra Pre-emption Act), section 5 —Pre-emption—Wajib-ul-arz—Custom*

The wajib-ul-arz of a village contained the following provision on the subject of pre-emption :—" Up to the present time there has been no case of pre-emption in this village, but in the surrounding villages there is a custom of pre-emption by which, when one co-sharer wishes to sell his land, pre-emption is to be allowed in favour of . [Here follows the scheme of pre-emption]"

Held with reference to section 5(1) of the Agra Pre-emption Act, 1922, that a right of pre-emption was necessarily implied as existing in the village in question.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Ambika Prasad Pande*, for the appellant.

Dr *Kailas Nath Katju*, for the respondents

LINDSAY and SULAIMAN, JJ. :—This is a pre-emption appeal. The suit was brought by the appellant and professed to be a suit under the Agra Pre-emption Act, XI of 1922. The courts below have dismissed the claim on the ground that no right of

* Second Appeal No 775 of 1925, from a decree of Babu Ganga Prasad Varma, Second Additional Subordinate Judge of Cawnpore, dated the 9th of January, 1925, confirming a decree of Babu Moti Lal, Second Additional Munsif of Cawnpore, dated the 31st of October, 1924

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SHAM LAL v. DWARKA PRASAD

pre-emption exists in this village, and this decision is founded upon the interpretation of section 5 of the Act, together with a construction of an extract from the wajib-ul-arz

There was produced before the courts below a wajib-ul-arz in which substantially the record was couched in the following language :—

"Up to the present time there has been no case of pre-emption in this village, but in the surrounding villages there is a custom of pre-emption by which, when one co-sharer wishes to sell his land, pre-emption is to be allowed in favour of . . . [Here follows the scheme of pre-emption.]"

The courts below were of opinion that this record did not satisfy the requirements of section 5 of the Pre-emption Act. Section 5(1) says that the right of pre-emption shall be deemed to exist only in mahals or villages in respect of which any wajib-ul-arz prepared prior to the commencement of this Act records a custom, contract or declaration recognizing, conferring or declaring a right of pre-emption expressly or by necessary implication We think, on the proper construction of the language of this wajib-ul-arz, that it ought to be held that a custom of pre-emption is necessarily implied We have just decided Second Appeal No. 550 of 1925 in which the language of the wajib-ul-arz resembled very closely the language of the wajib-ul-arz now under consideration. The only difference between the two documents is that in the wajib-ul-arz which was being dealt with in Second Appeal No 550 there was added to the record the following words :—

"Aur yeh dastur hamko manzur hai."

These words find no place in the wajib-ul-arz which we are considering At the same time, it seems

to us fairly obvious that it was the intention of the owners of this village to have a custom of pre-emption recorded. We are satisfied, therefore that in respect of this village there is a wajib-ul-arz prepared prior to the commencement of the Agra Pre-emption Act, a wajib-ul-arz which records, at least by necessary implication, the existence of a custom or contract That being so, the plaintiff was entitled to pre-empt. No other matters are now in dispute between the parties. The result, therefore, is that we allow the appeal and give the plaintiff a decree for pre-emption.

Appeal allowed

Before Mr Justice Lindsay and Mr Justice Sulaiman

LACHMAN PRASAD AND ANOTHER (DEFENDANTS) v FAIZ-UL-HASAN AND ANOTHER (PLAINTIFFS).* 1926 *October*, 21.

Act (Local) No XI of 1922 *(Agra Pre-emption Act), section* 12*—Pre-emption—"Petty proprietary interest"—Isolated plots in a village*

A separate plot of land in a village is not necessarily a "petty proprietary interest" within the meaning of section 12 of the Agra Pre-emption Act, 1922

Semble that the right of pre-emption in respect of a "petty proprietary interest" is not confined to co-parceners in the same interest

THE facts of this case sufficiently appear from the judgement of the Court

L. M. Roy, for the appellants.

LINDSAY and SULAIMAN, JJ.:—These two appeals raise the question of the proper interpretation of section 12 of the Agra Pre-emption Act.

* Second Appeals Nos 2276 and 2277 of 1925, from decrees of Makhan Lal, Additional Subordinate Judge of Bulandshahr, dated the 5th of October, 1925, confirming a decree of Syed Nawab Hasan, Munsif of Khurja, dated the 16th of December, 1924.

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LACHMAN PRASAD v. FAIZ-UL-HASAN

The plaintiff Faiz-ul-Hasan brought two separate suits for pre-emption in respect of two separate sets of items of property situated in mauza Nawada, mahal Baqi Manda, patti Muhammad Haji, Khewat No. 1

In each case the plaintiff claimed pre-emption on the ground that he was a co-sharer in the mahal. It has been found by the courts below that the plaintiff is in fact a co-sharer in the mahal and is also the lambardar, and it is further found that he is a cousin of the vendor.

The plots of land which were sold in these sale-deeds were specified as separate plots situated in the khewat mentioned above The vendees resisted the claim and put forward the case that they had as good a right of pre-emption as the plaintiff. In the lower appellate court the point seems to have been taken on behalf of the vendees that the interests sold under each of these sales were petty proprietary interests and that the plaintiff had no right to pre-empt. regard being had to the provisions of section 12 of the Pre-emption Act, sub-section (1), class 1.

It is clear on all hands that the property sold is situated in patti Muhammad Haji of mahal Baqi Manda. Neither party is a co-sharer in that particular patti. It is proved that they are co-sharers in another patti of the same mahal and we have already mentioned that the plaintiff is the lambardar of the same mahal and is a cousin of the vendor. The court of first instance decreed the plaintiff's claim and on appeal that decision has been affirmed by the lower appellate court.

The first ground taken here in appeal is that the lower appellate court was wrong in holding that the properties sold in these two sales were not petty proprietary interests. The Subordinate Judge was of

opinion that although the sale-deeds purported to transfer specified plots, nevertheless those plots were not petty proprietary interests within the definition contained in section 4. The reasons given in support of this decision by the lower appellate court seem to us to be sufficient and we think the Subordinate Judge was right in holding that the land sold did not constitute merely what is known as petty proprietary interest. Assuming, however, that it is possible to treat these sales as being sales of a petty proprietary interest we are still of opinion that the decision of the court below is correct and that the plaintiff's suits were bound to succeed

It is argued in the second ground of appeal taken before us that the terms of section 12, sub-section (1), preclude the enforcement of these claims. The argument is put in this way.—It is said that class 1 specified in section 12, sub-section (1), relates to the case of a sale of a petty proprietary interest and it is sought to be argued that the only person who can enforce a right of pre-emption in respect of such a sale is a person who is a co-parcener in such interest. In other words it is contended that where no co-parcener in the petty proprietary interest comes forward to seek pre-emption, no suit for pre-emption on behalf of any of the persons specified in classes 2 to 5 of section 12, sub-section (1), can lie. We are of opinion that this argument cannot prevail The scheme of pre-emption laid down in section 12, sub-section (1), clearly contemplates the successive exercise of rights of pre-emption, so that where no claim of pre-emption is brought by anyone who falls within class 1 a right to enforce pre-emption can be enforced successively by those persons who fall within the following classes. We think this construction of section 12 is made clear by the terms of section 11. It follows, therefore,

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LACHMAN PRASAD v. FAIZ UL-HASAN

that even if we were to hold in favour of the appellants here that the interests which were transferred by these two sale-deeds were petty proprietary interests, the plaintiff was nevertheless entitled to succeed

The only other question raised in the memorandum of appeal is concerned with the language of section 12, sub-section (3), of the Act. This sub-section lays down: "Where there are more persons than one of the same class claiming pre-emption, that person who is related to the vendor and is descended from the common ancestor, but not removed by more than four degrees, including the common ancestor, shall be entitled to pre-emption as against other persons of the same class."

We have already pointed out that it has been found as a fact that the plaintiff in this case is a cousin of the vendor

It is sought to be argued that sub-section (3) cannot be applied to these cases, because it is said that the defendants vendees are not "claiming pre-emption" within the meaning of sub-section (3) of section 12. It has, however, been held several times that a defendant who is resisting a suit for pre-emption on the ground that he has as good a right of pre-emption as the plaintiff is "claiming pre-emption" within the meaning of this sub-section—*Ishwar Dat* v *Mahesh Dat* (1). This decision has been followed in subsequent cases

Both appeals fail and we dismiss them accordingly under order XLI, rule 11 of the Code of Civil Procedure

Appeal dismissed.

(1) (1925) 23 A L J . 862

Before Mr. Justice Dalal and Mr. Justice Pullan

BIRBAL (APPLICANT) *v* THE COLLECTOR OF MORADABAD (OPPOSITE PARTY).* 1926 October, 28

Act No I of 1894 (Land Acquisition Act), sections 9 and 25—Acquisition of land—Notice to persons interested

Held, on a construction of section 9 of the Land Acquisition Act, 1894, that the rule requiring an interval of fifteen days between the issue of the public notice provided for by clause (2) and the hearing of claims by the Collector does not apply to a personal notice issued under clause (3)

If after notice duly issued under section 9 (2) no claim is made before the Collector and no cause shown for the omission to make a claim, the District Judge on a reference made to him cannot award any larger amount than that awarded by the Collector. *Secretary of State for India in Council* v *Bishan Dat* (1) and *Naram Dat* v *The Superintendent of Dehra Dun* (2), referred to

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

Mr. *G W Dillon*, for the appellant.

Dr. *M Wali-ullah*, for the respondent.

DALAL and PULLAN, JJ —A reference was made by the Collector to the District Judge of Moradabad under section 18 of the Land Acquisition Act, being moved to do so by a person in whose favour an award was made by the Collector. The learned Judge fixed the award at the amount fixed by the Collector on the ground that the applicant had failed to make any claim after public notice under section 9 of the Act, and, therefore, the District Judge was precluded from making an award exceeding the amount fixed by the Collector under section 25(2).

Birbal, on whose application reference was made to the learned District Judge, has appealed

* First Appeal No 323 of 1923, from a decree of A H deB Hamilton, District Judge of Moradabad, dated the 23rd of April, 1923

(1) (1911) I L R, 33 All., 376 (2) (1914) I L R, 37 All., 69

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to this Court. It appears that public notice under section 9(2) was given as to the particulars of the land needed and calling upon persons interested to appear before the Collector. This notice was issued on the 17th of March, 1922. Another notice was personally served on Birbal on the 26th of April, 1922. The date fixed for the hearing before the Collector was the 8th of May, 1922. It is argued here on behalf of the appellant that the notice served on him was not a legal notice, because it did not allow fifteen days' time after service of the notice to appear before the Collector. We do not think that this rule as to time extends to personal notice served under clause (3). It is stated in clause (2) of section 9 that persons interested in the land shall be required to appear personally, or by agent, before the Collector at a time (not being earlier than fifteen days after the publication of the notice) and place mentioned in the notice. Such a provision is not repeated in clause (3) of section 9. In the present case public notice was given more than six weeks prior to the date fixed for hearing of applications by the Collector. The applicant had sufficiently long personal notice to enable him to appear before the Collector We are of opinion that the public notice and the notice served on him personally under section 9 were valid notices. The provisions of section 25(2) have been enforced by this Court in *Secretary of State for India in Council* v *Bishan Dat* (1) and in *Narain Dat* v. *The Superintendent of Dehra Dun* (2) It was not argued here that the appellant had sufficient reason to omit to make a claim under section 11. It is true that the District Judge did not specifically consider this matter, but obviously no sufficient reason as would be allowed by a District Court exists.

(1) (1911) I L R , 33 All , 876 (2) (1914) I.L.R., 37 All., 69.

We are of opinion that the view of law taken by the lower court is correct and dismiss this appeal with costs.

Appeal dismissed.

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BIRBAL v. THE COLLECTOR OF MORADABAD

Before Mr. Justice Dalal and Mr. Justice Pullan

BALDEO SAHAI (DECREE-HOLDER) *v.* JAFAR HUSAIN AND OTHERS (JUDGEMENT-DEBTORS) *

1926 November 1.

Act No IX of 1908 (*Indian Limitation Act*), *sections* 19 *and* 20—*Limitation—Application for a final decree*

Although the time for an application for a final decree may be extended under either section 19 or section 20 of the Indian Limitation Act, 1908, if the cause for extension alleged is part payment of the decretal debt it is necessary that such payment be attested by some writing by the hand of the person making the payment. *Subbalakshmi Ammal* v *Ramanujam Chetty* (1), referred to

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellant.

Mr. *A. Sanyal*, for the respondents.

DALAL and PULLAN, JJ. —It has been found by the courts below that this application for a final decree is barred by time, as it has been made more than three years after the passing of the preliminary decree The plaintiff sought to bring his application within time by proving a payment by the judgement-debtor within three years A single Judge of this Court has referred the case to a Bench, holding that this is a matter of some importance and there is no direct authority upon it.

* Second Appeal No 753 of 1924, from a decree of Abdul Hasan, Additional Subordinate Judge of Moradabad, dated the 22nd of February, 1924, confirming a decree of Ali Muhammad, Munsif of Nagina, dated the 18th of November, 1922.

(1) (1918) I L R, 42 Mad, 52

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PALDEO SAHAI v. JAFAR HUSAIN

There is no question that article 181 of the Limitation Act applies to the case, and that, therefore, an application for final decree must be made within three years of the preliminary decree, unless the period can be extended. The argument addressed to us on behalf of the appellant is that section 20 of the Limitation Act lays down that where part of the principal of a debt is paid before the expiration of the prescribed period, a fresh period of limitation shall be computed from the time when the payment was made; and that as debt includes money payable under a decree, the payment alleged to have been made by the judgement-debtor in this case gives rise to a fresh period of limitation for an application by the decree-holder for a final decree. We are not prepared to follow the lower appellate court in its finding that "decree" for the purposes of section 20 of the Limitation Act means only a final decree capable of execution and not a preliminary decree for sale. On the contrary we are of opinion that such a preliminary decree constitutes a debt payable by the judgement-debtor. We are also of opinion that time may be extended for an application for a final decree under either section 19 or section 20 of the Limitation Act. But the former of these sections requires a written acknowledgement of liability and the latter demands that the fact of payment should appear in the handwriting of the person making the same. In the case reported in *Subbalakshmi Ammal* v *Ramannjam Chetty* (1) it was held that an application made by the judgement-debtor for the adjournment of the sale gave a fresh starting point for the decree holder's subsequent application for a final decree. We see no reason to differ from the opinion expressed by the Madras High Court, but that ruling could only be

(1) (1918) I L R 42 Mad., 52

relevant to the present case if the payment alleged to have been made within three years of the filing of this application had been attested by some writing by the hand of the person making the payment. In the present case no such allegation is made by the plaintiff, and the fact of the payment is denied by the defendant.

In our opinion the payment alleged to have been made on the 8th of March, 1920, does not extend the period of limitation for making an application for a final decree The application, therefore, was barred by time, and this appeal must fail.

We dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

SRI KRISHAN DAS AND OTHERS (DEFENDANTS) *v.* NATHU RAM AND ANOTHER (PLAINTIFFS)

J C* 1926 Lee, 10

[On appeal from the High Court at Allahabad.]

Hindu law—Joint family property—Alienation—Necessity—Purchaser making due inquiry—Proof of application of price

A sale of joint property should not be set aside merely because part of the proceeds, which is not a small part, is not proved to have been applied to purposes of necessity The real question to be considered is whether the sale itself was justified by necessity; if the purchaser has acted honestly and made due inquiry as to the existence of necessity, he is not bound to account for the application of the price.

In a suit to set aside a sale of joint family property, it was proved that the purchaser had made due inquiry as to the necessity for the sale, that Rs 3,000 out of the price of Rs. 3,500 had been applied to purposes of necessity, and that the price was adequate The High Court made a decree

* *Present* —Lord PHILLIMORE, Lord BLANESBURGH, Lord SALVESEN and Sir JOHN WALLIS

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setting aside the sale conditionally upon Rs. 3,000 being repaid to the purchaser

Held that the decree was contrary to principle and authority, and that the suit should be dismissed.

A decree upholding a sale conditionally upon the purchaser paying a small part of the price not proved to have been applied to purposes of necessity is also contrary to authority.

Hunoomanpersaud's Case (1), followed *Girdharee Lall* v. *Kantoo Lall* (2), discussed *Gobind Singh* v. *Baldeo Singh* (3), *Ram Dei Kunwar* v. *Abu Jafar* (4), *Dwarka Ram* v. *Jhulai Pande* (5), and *Daulat* v *Sankatha Prasad* (6), disapproved

Judgement of the High Court reversed.

Appeal (No. 183 of 1924) from a decree of the High Court (May 30, 1921) reversing a decree of the Additional District Judge of Aligarh, which reversed a decree of the Subordinate Judge of Aligarh.

The suit was brought by the respondents in 1918 to set aside a sale of joint property made in 1902 by their father, he was made a defendant but did not contest the suit.

The facts, which were no longer in dispute, appear from the judgement of the Judicial Committee.

The Subordinate Judge set aside the sale, but an appeal to the District Court was allowed and the suit dismissed.

On a second appeal to the High Court (LINDSAY and KANHAIYA LAL, JJ), the decree of the District Court was set aside and a decree made for possession conditionally upon the plaintiffs paying into Court the sum of Rs 3,000. The reasons of the learned Judges are stated in the present judgement

(1) (1856) 6 Moo I A, 393
(2) (1903) I L R, 25 All., 330
(3) (1874) L R 1 I A., 321
(4) (1905) I L R, 27 All., 494.
(5) (1923) I L R, 45 All, 429
(6) (1924) I L R, 47 All., 365.

1926 Nov 1. *Dube*, for the appellant *Hyam*, for the respondent.

In addition to the cases referred to in the judgement reference was made to *Phool Chand Lal* v *Rughoobuns Suhaye* (1), *Mutteeram Kowar* v *Gopaul Sahoo* (2), *Jainarain Pande* v. *Bhagwan Pande* (3).

Dec 10 The judgement of their Lordships was delivered by Lord SALVESEN.

This is an appeal from a judgement and decree dated the 30th of March, 1921, of the High Court of Judicature at Allahabad which on second appeal reversed a judgement and decree dated the 1st of February, 1919, of the Additional District Judge of Aligarh who had set aside a judgement and decree dated the 30th of August, 1918, of the Subordinate Judge of Aligarh

The petition of plaint was at the instance of Nathu Ram and his brothers, sons of one Dungar Mal, and was directed against Kanhaiya Mal who had purchased ancestral property from the plaintiffs' father in the year 1902, and the main relief sought was that the sale-deed dated the 23rd of December in that year should be declared invalid, and the plaintiffs awarded proprietary possession of the property thus alienated by their father. The property sold consisted of—

(1) One moiety share in a 6 biswa, 5 biswansi zamindari share of a property in mauza Daulatpur.

(2) A proportionate share in 51 bighas, 18 biswas, 13 biswansis *pukhta* of a zamindari property in the same mauza both situated in the district of Aligarh.

The plaintiffs were members of a Hindu joint family of which their father, Dungar Mal, was manager, and were minors at the date of the sale-deed,

(1) (1867) 9 W R., 106 (2) (1873) 11 Ben L R, 416
(3) (1922) I L R, 44 All, 663

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and the eldest of them only attained majority some short time before the suit was brought The plaintiffs' father, Dungar Mal, was made a party to the action but did not defend He was alive at the date of the trial, but has since died

The facts found by the District Judge of Aligarh, which are admittedly conclusive, may be summarized as follows —

(1) The sale-deed in favour of the defendant No 1's father was executed in December, 1902, and the consideration therein stated of Rs 3,500 was paid in cash

(2) The property in question had been previously sold by auction, but on the 5th of January, 1902, Dungar Mal paid Rs 1,300 to get this sale set aside and shortly before that he had spent a sum of about Rs. 4,000 on his sister's wedding

(3) In order to meet part of his indebtedness thus incurred, Dungar Mal had borrowed on promissory notes from Kewal Ram, a money-lender, two sums of Rs 1,000 and Rs. 1,600

(4) These two sums, with interest bringing the total up to Rs 3,000, were discharged out of the consideration money paid by the vendee, and the promissory notes delivered up.

(5) Before purchasing the property from the Hindu father the vendee ascertained the facts above mentioned.

(6) There was no evidence as to how Dungar Mal applied the Rs 500, the balance of the purchase price, and he did not tender himself as a witness

(7) The Additional Judge accepted the conclusion of the Subordinate Judge that the sale was made for adequate consideration, and indeed, that the seller got a good price for it

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(8) He appears also to have accepted the view of the Subordinate Judge that there was no truth in the allegations made by the plaintiffs against their father as to his leading an immoral life, but that there were grounds for holding that the suit had been instigated by him

(9) During the sixteen years preceding the action the vendee spent large sums on the improvement of the property the value of which at the date of the suit now exceeds Rs 10,000. On these facts the Additional Judge held in law that the sale was executed "for legal necessity" and, therefore, the transaction was one which the plaintiffs cannot set aside He accordingly dismissed the suit with costs.

The plaintiffs appealed to the High Court, the main, if not the only ground of their appeal being that the sum of Rs 500 had not been applied in payment of debts for which the property sold could have been charged This argument prevailed In their judgement the learned Judges said: "It is difficult to decide cases of this nature upon any fixed principle. It has been held by their Lordships of the Privy Council that in cases where the father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds has been satisfactorily accounted for, the fact that a small part is not accounted for will not invalidate the sale That principle has been followed in numerous cases The difficulty always is to ascertain what amount, in cases like this, is the bulk of the purchase money"

After referring to two Allahabad cases to which more particular reference will afterwards be made, the learned Judges go on to say:—"We have, therefore, to deal with each case on its merits, and to decide whether in a particular instance the amount for

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which the legal necessity has not been proved is, with regard to the whole consideration, what may be described as a trifling sum. In the present case it is shown that out of Rs 3,500 only Rs 3,000 represented the money which was taken for legal necessity. We should find it difficult, having regard to the decisions of this Court, to hold that Rs 500 is in this instance a trifling amount, and we think, therefore, that we ought to follow the line which was taken in the two Allahabad cases above referred to" They accordingly gave the plaintiffs a conditional decree by which they were declared entitled, on payment of Rs 3,000 within six months from the date of the decree, to have the sale set aside, and the property returned by the defendant No. 1.

The two decisions referred to by the learned Judges, and which were treated as binding by them, are those of *Gobind Singh* v. *Baldeo Singh* (1), and *Ram Dei Kunwar* v. *Abu Jafar* (2). In the former of these cases, on a suit to set aside the sale of family property it was found that out of the total consideration of Rs. 3,299, 8 annas, a sum of Rs 2,923, 8 annas represented money which had been applied for purposes of legal necessity In the second case it was found that Rs 2,550 out of the total consideration of Rs 2,995 represented money taken for legal necessity. In both cases conditional decrees setting aside the sales were passed on payment of the sums which were found to have been applied for purposes of legal necessity Considering, therefore, the matter simply as one of arithmetical calculation the decision in the present case may be said to have followed upon these and so from the point of view of the learned Judges, who decided the present case, to have been sufficiently justified.

(1) (1903) I.L.R., 25 All., 380 (2) (1905) I.L.R., 27 All., 494.

The appellants, however, contended that the two decisions founded on were wrongly decided, and as they are not binding upon their Lordships' Board their argument involves a review of the whole authorities with a view to ascertaining the correct principles on which similar questions to those raised in the present suit ought to be decided. In view of the diversity of opinion in the various presidencies of India, their Lordships consider that they are bound to accede to this demand, and not the less so because even in Allahabad a recent judgement of the High Court, which is printed as part of the record, appears to be at variance with the three preceding judgements In that case the court of first instance had found that out of the entire consideration of Rs 1,500 a sum of Rs. 967 only represented debts binding upon the family property It was held that to the extent of the balance of Rs 532 no legal necessity was established The District Judge, differing from the trial court, held that the sale should be sustained, that there were binding debts to the extent of Rs. 1,196 and that as the bulk of the purchase money went to satisfy these debts the plaintiffs had no right to cancellation of the sale. This judgement was affirmed by the High Court although the difference between the purchase money and the debts which were found to create the legal necessity was much greater proportionally than in the present case or in the two cases on which reliance was placed, above referred to The ground of differentiation was that the property sold was a moiety share of a fixed rate tenancy over which there also extended a mortgage, and that in such circumstances " it is not always possible for the father of a family to sell just that share of the property which will bring in the precise sum which is wanted to clear the debts which are binding " These two considerations apply equally in the present case.

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In their decision the learned Judges of the High Court rely on the authority of the case of *Girdharee Lal* v. *Kantoo Lall* (1), decided in 1874, and especially on the head-note which contains this passage :—

" Where a father has sold ancestral property for the discharge of his debts, if the application of the bulk of the proceeds is accounted for, the fact that a small part is not accounted for will not invalidate the sale "

While this is in itself a correct statement of the law so far as it goes, it does not by any means follow, as the learned High Court Judges seem to have thought, that it is a complete statement of the law or that the sale will be invalidated wherever the part of the consideration not accounted for cannot be described as small If this were sound, the question would in each case be a matter of arithmetical calculation, and opinions would necessarily vary as to what constituted the " bulk of the proceeds " or " a small part " of the same in each particular case. The learned Judges seem to have lost sight of the true question which falls to be answered in such cases, viz., whether the sale itself was one which was justified by legal necessity This is the point of view from which the matter is approached in the earliest case cited at the Bar, that of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (2), decided by the Board in 1856. The case related to a charge upon property by way of mortgage, and not to a sale, but the principles to be applied appear to their Lordships to be the same as in the case of a sale of property. The head-note states correctly the points actually decided, so far as bearing on the present case :—

" The power of a manager for an infant heir to charge ancestral estate by loan or mortgage is by the Hindu law a limited and qualified power, which can only be exercised

(1) (1874) L R, 1 I A, 321 (2) (1856) 6 Moo. I A, 393.

rightly by the manager in a case of need, or for the benefit of the estate . . . The actual pressure on the estate, the danger to be averted, or the benefit to be conferred in the particular instance, are the criteria to be regarded .

" A lender, however, in such circumstances, is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate If he does inquire, and acts honestly, the real existence of an alleged and reasonably-credited necessity is not a condition precedent to the validity of his charge, which renders him bound to see to the application of the money "

In delivering the judgement of the Board Lord Justice KNIGHT BRUCE, after stating the law substantially as laid down in the head-note, said :—

" The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application Their Lordships do not think that a *bond fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived " (p 424)

This decision was followed, in the case of a sale by a Hindu widow, in the case of *Ram Gopal Ghose* v. *Bullodeb Bose* (1), where it was held by the High Court of Calcutta that—

" Where there is no doubt as to the necessity for a sale by a Hindu widow and the vendee pays a fair price for the property sold, and acts throughout *bond fide*, the mere fact of only two-thirds of the purchase money having been paid to creditors would not invalidate his conveyance, he not being bound to see to the application of his money "

A similar decision was pronounced by the same Court in *Baboo Luchmeedhur Singh* v. *Ekbal Ali* (2), where it was laid down that—

" The rule that only so much of the property should be sold as will meet the necessity, does not apply to cases where

(1) (1864) W R, 385 (2) (1867) 8 W R, 75 (77)

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the excess is small, or where the money really required cannot otherwise be raised "

The case was a strong illustration of the principle laid down by Lord Justice KNIGHT BRUCE, because there was an admitted surplus of about Rs. 14,000, as to the mode of application of which there was no very distinct evidence, the total sale price having been Rs 65,000 Nevertheless, the learned Judge who delivered the opinion of the High Court, made this observation :—

" Looking at the transaction as a whole, we consider it to be one in which it is proved that the purchaser acted with reasonable and sufficient care and caution and in which a sufficient necessity did exist. We, therefore, declare the sale to be good and valid against the plaintiff "

This case was followed by another in the same court, *Lala Chatranarayan* v *Uba Kunwari* (1), where a sale of a portion of an estate by a widow for Rs. 995 to pay off a debt of her father-in-law of Rs 670 was not invalidated by the mere fact that she sold it for more than the amount of the debt when the purpose for which the sale was made, namely, the payment of the ancestral debt, was quite legal

Similarly, in *Kamikhaprasad Roy* v. *Srimati Jagadamba Dasi* (2), Mr Justice MARKBY expressed the opinion, thus paraphrased in the head-note, that—

" In purchasing from a Hindu widow the purchaser is not bound to look to the appropriation of the money, nor is he affected by the fact that the alienation was made for a larger sum than the necessity of the case required."

Reference may also be made to the case of *Felaram Roy* v *Bagalanand Banerjee* (3), decided in 1910 in which the Calcutta High Court held that—

" Where a Hindu widow *bonâ fide* executed a permanent lease upon taking a *selami* of Rs 125 in order to pay off a

(1) (1868) 1 Ben , L R , 201 (2) (1870) 5 Ben , L R , 508.
(3) (1910) 14 C.W N , 895

debt of her husband amounting to Rs. 100, this was not a case in which the reversioners should be allowed to recover possession upon payment of the amount actually needed to pay off the loan "

In the course of their judgement the learned Judges made this observation :—

" It would manifestly be impossible, and possibly prejudicial to the interest of the estate, if the widow were to be held to be bound in every instance to sell property for payment of a debt due from her husband for exactly the sum due to the creditor."

More important than any of these is the decision of this Board in an appeal from Madras, *Medai Dalavoi* v. *Nainar Tevan* (1). In that case the widow of a separated Mitakshara Hindu sold property belonging to her husband's estate in her possession as limited owner for Rs 5,300, in order to pay off Rs 4,588 due on two mortgages executed by her husband The balance of Rs 712 was appropriated by the widow to a purpose which did not constitute a legal necessity, but it was held that the sale was not invalid on this account, as the purchasers were not bound to see how the widow applied the purchase money.

All these decisions are, in their Lordships' opinion, entirely inconsistent with the judgement appealed from, and with the Allahabad cases on which it was based They are equally inconsistent with the decision in a recent case from the same province, *Dwarka Ram* v. *Jhulai Pande* (2), and especially with the ground of judgement therein enunciated in the following absolute terms :—

" If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside, but if a portion of the consideration was good and binding on the plaintiff he would be entitled to reimburse it to the defendant The form of the decree in a

(1) (1922) 27 C W N , 865 (2) (1923) I L R , 46 All , 429

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case of this kind should, therefore, be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family "

In a still more recent case from the same province, *Daulat* v. *Sankatha Prasad* (1), the Judges of the High Court appear to have reverted to the principles upon which the judgement now under review is based, holding that—

" The criterion for deciding whether the sale should be upheld or set aside is whether the portion which was not taken for legal necessity was such a small portion of the whole consideration that it might reasonably be left out of account."

As the sum in question was only Rs 105 out of a total consideration of Rs 2,142-12-6, the court upheld that sale transaction, but directed the defendants to repay to the plaintiff the sum of Rs. 105 which was found not to be covered by legal necessity. It is to be remarked that this is the only case of those cited to their Lordships in which an order for repayment of a small sum was made although the sale itself was sustained, and is entirely opposed to the whole current of authority. It was not done in the recent case decided by this Board *Mast Ullah* v *Damodar Prasad* (2) There a sum of Rs 2,000 out of a total consideration of Rs 18,400, was not shown to have been applied in the discharge of ancestral debts, but, on the other hand, there was no evidence that it was used for immoral or unauthorized purposes. In setting aside the judgement of the High Court and dismissing the plaintiffs' suit their Lordships made no condition as to the repayment of this balance of Rs. 2,000. It would rather appear that in any case where the sale has been held to be justified, but there is no evidence as to the

(1) (1924) I L R., 47 All., 365

(2) (1926) L R 53 I A , 201; I L R , 48 All , 518.

application of a portion of the consideration, a presumption arises that it has been expended for proper purposes, and for the benefit of the family. This is in line with the series of decisions already referred to, in which it was held that where the purchaser acts in good faith and after due inquiry, and is able to show that the sale itself was justified by legal necessity, he is under no obligation to inquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to the members of the family challenging the sale

Applying the principles laid down in the above series of cases by this Board, and consistently followed in other courts in India, except in Allahabad, their Lordships have reached the conclusion that the judgement of the High Court cannot be sustained On the facts found by the District Judge it must be taken that the sale challenged was made after due inquiry as to the legal necessity by the vendee: that such necessity has been proved by him to the extent of Rs 3,000 out of a total price of Rs 3,500, that the sale was for an adequate consideration and that the mere fact that after a long interval of time the appellants have not been able to establish how the surplus of Rs 500 was applied is not a sufficient ground in law for setting aside the sale They will, therefore, humbly advise His Majesty that the judgement and decree of the High Court should be set aside and the plaintiffs' suit dismissed with costs in all the courts, including the costs of the present appeal

Solicitor for appellants *H S L Polak*

Solicitors for respondents *Douglas Grant* and *Dold*

APPELLATE CIVIL.

Before Mr Justice Sulaiman and Mr Justice Muker.

1926 June, 3

ABBAS ALI KHAN (DEFENDANT) *v* CHOTE LAL (PLAINTIFF) *

Act No. IV of 1882 (*Transfer of Property Act*), *section* 89—*Mortgage—Decree for sale—Satisfaction of decree by third party—Security kept alive.*

Where a mortgage debt, for the payment of which a sale has been ordered, is satisfied by a third party who obtains a security for the advance made by him, such security is not extinguished by section 89 of the Transfer of Property Act and the encumbrance in respect of which the sale was ordered enures for the benefit of the party making the payment. *Bibijan Bibi* v. *Sachi Bewah* (1), followed. *Shivm Lal* v. *Bashir-ud-din* (2), *Matru Lal* v. *Durga Kumar* (3), *Chhagan Lal* v *Muhammad Husain Khan* (4), *Sukhi* v *Ghulam Safdar Khan* (5), *Vanmikalinga Mudali* v. *Chidambara Chetty* (6), and *Het Ram* v *Shadi Ram* (7), referred to.

The facts, so far as they are material for the purpose of this report, were these :—

Jamil-ur-Rahman made a mortgage in favour of Hargu Lal in 1900, and another mortgage in favour of Ram Kumar in 1901; some items of property were common to both mortgages Ram Kumar sued on his mortgage and obtained a preliminary decree on the 11th of March, 1907, and an order absolute for sale. under section 89 of the Transfer of Property Act, on the 4th of January, 1908 The prior mortgagee, Hargu Lal, was made a party to the suit, and in accordance with the terms of the decree Ram Kumar redeemed the prior mortgage and so became entitled to bring the property to sale in satisfaction of both

* Appeal No 104 of 1925, under section 10 of the Letters Patent.

(1) (1904) I L R, 31 Calc, 863 (2) (1906) I L R, 28 All, 776
(3) (1919) I L R, 42 All, 964 (4) (1919) I L R, 41 All, 456
(5) (1921) I L R, 43 All, 469 (6) (1905) I L R, 29 Mad., 97.
(7) (1918) I L R, 40 All, 407

mortgage debts On the 2nd of September, 1908, a fresh mortgage was executed in favour of Chote Lal for Rs. 40,000, out of which Rs 35,000 odd was left with the mortgagee for satisfaction of Ram Kumar's decree and it was stipulated that by discharging the amount of that decree Chote Lal was to have the rights of Ram Kumar Chote Lal, having paid off the decretal amount, brought a suit on his mortgage. One of the defendants impleaded was Abbas Ali, who claimed to have certain charges upon some of the items of property which the plaintiff, Chote Lal, was asking to bring to sale; and he claimed, further, that those charges were prior to and had preference over the rights of the plaintiff, inasmuch as they related to certain other mortgages which had been executed by Jamil-ur-Rahman in 1906, 1907 and 1908, prior to the plaintiff's mortgage. On the other hand the plaintiff claimed priority, to the extent of the Rs. 35,000 odd, on the basis of subrogation to the rights of the mortgagees under the mortgages of 1900 and 1901 His case was that this money should come, in the first instance, out of the three villages Choharpur Bagad, Shahjehanpur and Athain, which had been included in the mortgages of 1900 and 1901 He admitted that the defendants Nos. 2 to 7, among whom was Abbas Ali, were prior mortgagees with respect to the remaining portion of his claim.

The plaintiff further claimed that he was entitled to recover, in part satisfaction of his claim, a sum of Rs 1,232 which was in deposit in court, as being the balance of the sale-proceeds of a 10 biswa share in village Muhammadpur, patti Jagir.

Abbas Ali contended that he was the person who had a prior charge On the question of priority there was a difference of opinion between LINDSAY, J and

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KANHAIYA LAL, J., hence this appeal under the Letters Patent

On this appeal—

Maulvi *Iqbal Ahmad* for the appellant.

Sir *Tej Bahadur Sapru* and Babu *Piari Lal Banerji* for the respondent.

The judgement of MUKERJI, J., after stating the facts as above, thus continued :—

We have to consider whether the two claims of the plaintiff are to be upheld as they have been upheld by the original court.

As regards Athain, the plaintiff's claim stands thus. As already stated, Ram Kumar held two mortgages, one of 1900 and the other of 1901, against properties Athain, Choharpur Bagad and Shahjehanpur. There were other properties involved in the mortgages, but Ram Kumar never sought to bring them to sale, apparently because they had been sold under a prior mortgage. The earlier mortgage was held by Hargu Lal Ram Kumar satisfied that mortgage and consequently brought a suit for recovery of the sums of money covered by the two mortgages. This suit was No 5 of 1907 and to this Abbas Ali was a party. Chote Lal satisfied the decree that was passed in favour of Ram Kumar, on the execution in his favour of the mortgage in suit The mortgage in suit was executed to satisfy the mortgage decree of Ram Kumar and the balance was paid to the mortgagor Chote Lal says that the sum of Rs 35,000 and odd that went to satisfy Ram Kumar's decree ought to come in the first instance from the villages of Athain, Choharpur and Shahjehanpur Abbas Ali's defence with respect to this portion of the claim is this. The decree that was passed in favour of Ram Kumar was passed under section 89 of the Transfer of Property Act of 1882,

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and that, therefore, on account of the rule contained in section 89, Ram Kumar's security was extinguished on the passing of the order absolute for sale Abbas Ali says that the security having been extinguished, Chote Lal is not entitled to take advantage of it

Let us see how far this contention is correct. The contention is based on the language of section 89 of the Transfer of Property Act and on two Privy Council cases which, it is said, upheld this reading of section 89.

Mukerji, J.

Section 89 of the Transfer of Property Act came in for interpretation in this Court in the case of *Shiam Lal* v. *Bashir-ud-din* (1) This Court interpreted section 89 as meaning that it was on the sale of the property that the security was to be extinguished and not earlier The learned Judges who decided the case felt considerable difficulty in understanding what was really meant by the legislature in saying "and thereupon the defendant's right to redeem and the security both shall be extinguished" They, however, followed a Full Bench case decided by five learned Judges of the Calcutta High Court—*Bibijan Bibi* v *Sachi Bewah* (2) The head-note of the decision of this Court runs as follows —

"Where a mortgage debt, for the payment of which a sale has been ordered, is satisfied by a third party, who obtains a security for the advance made by him, such security is not extinguished by section 89 of the Transfer of Property Act and the encumbrance in respect of which the sale was ordered enures for the benefit of the party making the payment"

Undoubtedly, therefore, under the authority of this Court and under the authority of the Calcutta High Court, Chote Lal, on the satisfaction of Ram Kumar's decree, would step into the shoes of Ram Kumar and of the still prior mortgagee Hargu Lal It is, however, said that the case of *Het Ram* v. *Shadi*

(1) (1906) I L R , 28 All , 778 (2) (1904) I L R , 31 Calc , 863

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Mukerji, J.

Lal (1), put a different interpretation on section 89 of the Transfer of Property Act and the rulings of this Court and that of the Calcutta High Court must be held as having been overruled In the case of *Het Ram*, there can be no doubt that their Lordships of the Privy Council put the construction that on the passing of the order absolute for sale the security of the decree-holder would be extinguished. But this observation was only an *obiter dictum* and it cannot be said that the question arose for determination specifically and was considered by their Lordships of the Privy Council as a contested point In the case before their Lordships the appellant was the successor in title of the mortgagor and also of the prior mortgagee. On the second mortgagee, who was not a party to the first mortgagee's suit, instituting a suit of his own, it was resisted by the appellant with the plea that he was the holder of a prior mortgage. Their Lordships pointed out that the earlier mortgage had been sued upon and the decree had been allowed to become barred by limitation The decree, therefore, never reached its logical consequence and became ineffective. The decree having become ineffective the mortgage died, as it were. This fact was enough for the decision of the case and their Lordships' pronouncement on the interpretation of section 89 was an *obiter dictum*, though, of course, it was an *obiter dictum* of the highest Court in the land, and is, therefore, entitled to its proper respect This case was followed by the case of *Matru Lal* v. *Durga Kunwar* (2). This was also a decision by their Lordships of the Privy Council and their Lordships intimated what interpretation the Board had put in the earlier case of *Het Ram* v *Shadi Lal* (1), on section 89 of the Transfer of Property Act. In this case of *Matru Lal* also, the question of

(1) (1918) I L R , 40 All , 407 (2) (1919) I L R., 42 All., 264

interpretation of section 89 never specifically arose Here the first mortgagee had brought a suit for sale under the Transfer of Property Act without making the second mortgagee a party to the suit The first mortgagee obtained a decree for sale and purchased the property in execution of the decree. The second mortgagee brought his suit in due course and offered to redeem the first mortgagee. The question arose whether the first mortgagee should be paid on foot of his mortgage or on foot of his decree It appears that if the first mortgagee was allowed to claim on foot of his mortgage, he would be entitled to a larger sum than what he could get under his decree. The High Court (Allahabad High Court) decided that the decree was the document to be looked at and their Lordships of the Privy Council upheld this view. Incidentally, they remarked that if the case of *Het Ram* v. *Shadi Lal* (1) had been known to the parties the plaintiff could very well have offered nothing to the first mortgagee auction-purchaser That was, however, a remark only by the way and there was no question of interpreting section 89, for a second time. These two cases were followed in this Court by several cases and first in order comes the Full Bench case of *Chhagan Lal* v. *Muhammad Husain Khan* (2) Here, again, the question of interpretation of section 89 came as a secondary point and the pronouncements of opinion can be treated only as *obiter dicta*. In this case, a second mortgagee, who had satisfied the first mortgage, obtained a decree for sale and the decree was made absolute in due course. There was a third mortgage and this mortgagee was not made a party to the suit of the second mortgagee. The second mortgagee took a fourth mortgage in consideration of the decretal amount due to him, and it was expressly stated in the mortgage that the decree

(1) (1918) I.L.R., 40 All., 407. (2) (1919) I.L.R., 41 All., 456

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Mukerji, J

would be deemed to have been discharged by the said mortgage When the third mortgagee brought his suit, the question arose whether this fourth mortgagee had any priority over the third mortgage, to the extent of the amounts of the first and the second mortgages The three learned Judges who decided the case were agreed that, on the terms of the fourth mortgage, there was no room for the contention that the first two mortgages had been kept alive That being so, the whole case ended there, and it was not necessary to say that on account of the passing of the order absolute for sale the security of the first two mortgagees became extinct When it was decided by the concurrent judgement of the three learned Judges that the fourth mortgagee had abandoned his security and did not choose to keep it alive, no further question arose as to whether the passing of the order absolute had or had not the effect of extinction of the security. The opinion of two of the learned Judges, therefore, on the point is nothing better than *obiter dictum*. This Full Bench case of *Chhagan Lal* v *Muhammad Husain Khan* (1) was followed by a Bench of two Judges in *Jagannath* v. *Chhatur Kunwar* (2) The learned Judges who decided the case accepted the correctness of the *obiter dicta* of two of the learned Judges in the Full Bench case A question involving similar facts again arose, but, this time, after the passing of the Code of Civil Procedure of 1908. The case went up to their Lordships of the Privy Council and is reported as *Sukhi* v *Ghulam Safdar Khan* (3) At their Lordships' bar the case of *Het Ram* v *Shadi Lal* was relied upon. Their Lordships pointed out that that judgement had been given under Act IV of 1882, section 89, which had since been repealed. Their Lordships also referred to the case of *Matru Lal* v. *Durga Kunwar* referred

(1) (1919) I L R., 41 All., 456 (2) (1922) I L R., 45 All., 140;
(3) (1921) I L R., 43 All., 469

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to above The case of *Sukhi* was decided on the Code of Civil Procedure of 1908, but their Lordships made a certain remark which is very significant and on which I put the greatest stress possible.

Their Lordships said, referring to the words quoted of section 89 of the Transfer of Property Act (see p. 475 of the report)

Mukerji, J.

"The difficulty which has arisen as to those words in several cases, for example, *Vanmikalinga Mudali* v. *Chidambara Chetty* (1), which case, it may be mentioned, does not seem to have been brought to the notice of their Lordships in *Het Ram's* case, therefore no longer arises. The decree in this case was in 1910 and was, therefore, under the Code of Civil Procedure rules and not under the section of the Transfer of Property Act, 1882 Now, the words being gone, their Lordships feel no difficulty in holding that the law remains as it certainly was before the Transfer of Property Act, 1882, namely, that an owner of a property who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded, to set up the first mortgage as a shield"

As I read this second paragraph of their Lordships' remark, I take it, that if the case of *Vanmikalinga Mudali* v *Chidambara Chetty* (1) had been pointed out to their Lordships, the decision in *Het Ram's* case would have been different Their Lordships undoubtedly laid stress on the fact that the law under the Code of Civil Procedure of 1908 was the same as it stood before the passing of the Transfer of Property Act Their Lordships do not say that the Transfer of Property Act really made any substantial difference in the pre-existing law Their Lordships do throw out the clear hint that if the case of *Vanmikalinga Mudali* v. *Chidambara Chetty* (1) (and we may, for the matter of that, add the cases in

(1) (1906) I L R , 29 Mad , 37.

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28 All., 778 and 31 Calc., 863) had been brought to their Lordships' notice, the opinion as to the interpretation of section 89 in the case of *Het Ram* would have been different. In the circumstances, I would read their Lordships' decision in *Sukhi's* case (43 All., 469) as, by a clear implication, overruling *Het Ram's* case (40 All., 407) and thereby releasing the courts in India from following what was, after all, an *obiter dictum* of their Lordships in *Het Ram's* case, on the interpretation of words which nobody understood as making sense

In this view, it is perfectly simple, that the respondent is entitled to a first charge on the village of Athain as to which Abbas Ali raises the contention

The case of Chote Lal is also sought to be rested on a plea of *res judicata* and that point has been dealt with by my learned brother in his learned judgement. I need not go over the same ground. It is sufficient to say that I agree with all that has been said by him on that point. The next question is as to who is entitled to the sum of Rs. 1,232 which is in deposit in court. There can be no doubt that Abbas Ali has a prior right to the sale-proceeds which really represent the property of 10 biswas of Muhammadpur patti Jagir, over which he has a prior charge. The plaintiff's claim with respect to this sum of money must fail.

SULAIMAN, J. —[The facts were very briefly recapitulated as above.]

The contention on behalf of Abbas Ali Khan is that the decree in favour of Ram Kumar was under the old section 89 of the Transfer of Property Act, and that as soon as the order absolute was passed under the provisions of that section the security became extinguished The contention accordingly is that the discharge of the mortgages of Hargu Lal and

Ram Kumar by Chote Lal did not give him any priority because the security under those mortgages was extinguished by the passing of the order absolute on the 4th of January, 1908. On the other hand, Ram Kumar's contention is that his priority was not extinguished

Prior to the passing of the Transfer of Property Act, it was well settled that a subsequent mortgagee who pays off a prior mortgage is entitled to priority on account of the payment Considerable difficulty, however, was caused by the language of section 89 of the Transfer of Property Act, which admittedly was not happy There was great speculation as to the correct meaning of the last portion of the section and very often it was remarked that it was not easy to discover what the Legislature had really intended. The Full Bench of the Calcutta High Court in the case of *Bibijan Bibi* v *Sachi Bewah* (1) had taken the view that the expression—" thereon the security shall be extinguished "—meant that this contingency would take place after the property had been sold and the sale-proceeds had been distributed. This view was followed by the Madras High Court in the case of *Vanmikalinga Mudali* v *Chidambara Chetty* (2) and by this High Court in the case of *Shiam Lal* v. *Bashir-ud-din* (3). The result of these rulings was that the mere fact that an order absolute had been passed did not bring about a complete extinguishment of the security, but that the priority continued. The language of the section, however, was difficult of interpretation. In the case of *Het Ram* v *Shadi Ram* (4) their Lordships of the Privy Council had before them the question of its interpretation In the clearest language possible their Lordships pronounced that the meaning of the section was that the

(1) (1904) I L R , 31 Calc . 863.
(2) (1905) I L R , 29 Mad . 37
(3) (1906) I L R , 28 All . 778
(4) (1918) I.L.R., 40 All . 407

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security became extinguished on the passing of the order absolute. This obviously negatived the previous interpretation that it became extinguished only after the sale and the distribution of the sale-proceeds. A possible view to take might have been that the security became extinguished only as between the parties to the suit. But in the case before their Lordships the second subsequent mortgagee was in fact not a party, nevertheless it was held that the security was extinguished. This case was, of course, followed by the Full Bench of this High Court in the case of *Chhagan Lal* v. *Muhammad Husain Khan* (1), where, too, it was held that on the passing of the decree absolute the security had been extinguished. It is true that all the three learned Judges in that case held that on the interpretation of the deed of transfer there could be no doubt that the intention of the parties was to bring about a complete discharge of the mortgage. But there can be also no doubt that two learned Judges, RAFIQ and LINDSAY, JJ., held that the effect of the provision of section 89 was to extinguish the mortgage. This case has in its turn been followed in the case of *Jagannath Prasad* v. *Chhatur Kunwar* (2). The question came up again before their Lordships of the Privy Council in *Matru Lal* v. *Durga Kunwar* (3), in which their Lordships again used the expression "the security had been extinguished on the passing of the decree." The case of *Sukhi* v. *Ghulam Safdar Khan* (4) turned on the interpretation of order XXXIV of the Code of Civil Procedure, from which the words "and the security shall be extinguished" have been omitted. This case, therefore, cannot be held to overrule the previous pronouncement. I, therefore, feel bound to hold that in

(1) (1919) I.L.R., 41 All., 456
(2) (1922) I.L.R., 45 All., 140.
(3) (1919) I.L.R., 42 All., 364
(4) (1921) I.L.R., 43 All., 469

view of the interpretation put on the section by their Lordships of the Privy Council it must be taken that the effect of the provisions of the old section 89 was to extinguish the security as soon as the order absolute was passed. It does not, however, follow from this that the priority also was necessarily extinguished. The passing of the order absolute put an end to the mortgage security, but that security was incorporated into and merged in the decree The priority of the mortgagee became the priority of a decree-holder. This question of extinguishment of priority did not at all arise in the case of *Het Ram* v. *Shadi Ram* (1) In that case the prior mortgagee had obtained a decree without impleading the second mortgagee but had failed to put it into execution and it became barred by time and unenforceable Not only that, but more than twelve years were allowed to expire from the date of the first mortgage by the time the second mortgagee brought his suit. Their Lordships accordingly held that in a suit brought by the subsequent mortgagee in which the prior mortgagee was impleaded, the latter had no right to claim priority either on the basis of his prior mortgage which had been extinguished and merged in the decree or on the basis of the decree which had become barred by time The question of priority under the decree, therefore, did not at all arise In the case of *Matru Lal* v *Durga Kunwar* (2), although their Lordships held that the effect of section 89 was to extinguish the security, nevertheless their Lordships allowed the defendants to claim the amount due under the mortgage decree as against the plaintiff I am, therefore, of opinion that there is no good ground for holding that the extinguishment of the security put an end to the priority which Ram Kumar decree-holder could claim by virtue of his decree.

(1) (1918) I L R , 40 All , 407. (2) (1919) I L R , 42 All , 364.

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Sulaiman, J.

Once it is conceded that Ram Kumar's prior claim under the decree remained, it is obvious that Abbas Ali Khan cannot be allowed to set up any mortgage claiming a prior right which he could not have been allowed to set up in the suit brought by Ram Kumar. Ram Kumar's decree must have precedence over all mortgages subsequent to those of Hargu Lal and Ram Kumar, even though they be prior to the decree of Ram Kumar. The position is further strengthened by the fact that both Abbas Ali Khan and Chote Lal, the present claimant, were parties to Ram Kumar's suit. Both of them were bound by Ram Kumar's decree. If, therefore, Chote Lal has paid off the whole of Ram Kumar's decree he is certainly entitled to set up the prior claim of Ram Kumar against his co-defendant Abbas Ali Khan.

The claim of Chote Lal is further strengthened by a circumstance operating as *res judicata*. In a subsequent suit brought by Chedan Lal on the basis of his mortgage-deed, dated the 22nd of October, 1906, against both Abbas Ali Khan and Chote Lal, the latter took the plea that he had a prior claim by virtue of having paid off the mortgage decree of Ram Kumar. In a judgement delivered on the 21st of February, 1913, the learned Subordinate Judge held that Chote Lal had priority over Chedan Lal as regards village Athain. Subsequently Chedan Lal proceeded to sell one of the mortgaged properties, viz., Munda Khera, which had been purchased by Abbas Ali Khan. Abbas Ali Khan's village was sold and satisfied Chedan Lal's decree. Abbas Ali Khan claims to have stepped into the shoes of Chedan Lal and claims priority on account of Chedan Lal's mortgage as against the plaintiff's mortgage of 1908. This claim is put forward by Abbas Ali Khan as representative of Chedan Lal. But the

learned Subordinate Judge had held against Chedan Lal himself that Chote Lal had a prior claim against him The contention of Abbas Ali Khan is accordingly barred by the principle of *res judicata*.

The result of this view is that so far as the village Athain is concerned, which was included in the mortgages of Hargu Lal and Ram Kumar, the plaintiff Chote Lal having paid off Ram Kumar's decree, is entitled to priority as against Abbas Ali Khan, who is a representative of the subsequent mortgagee. The result, therefore, is that the plaintiff will be entitled to a first charge against Athain and other villages included in the mortgages of Hargu Lal and Ram Kumar for the sum of Rs. 35,702-4-5 together with interest It is not open to Abbas Ali Khan to resist Chote Lal's claim to sell any of these properties for this amount After a sale has taken place. if any property of Abbas Ali Khan or any property over which he has a claim has contributed more than its due share, that is a matter for contribution which may arise in a subsequent suit This disposes of the first point raised by Abbas Ali Khan

Sulaiman, J.

The second contention of Abbas Ali Khan is that the village Mohammadpur Muafi had not been included in the mortgages of Hargu Lal and Ram Kumar. On the other hand it had been included in the mortgages of Chedan Lal and Gauri Shankar. It had also been included in an earlier mortgage of the 15th of September, 1897, in favour of Gauri Sahai Gauri Sahai brought a suit and obtained a decree, but the amount of the decree was paid by one of the judgement-debtors Durga Durga then brought a suit for contribution and got village Muhammadpur Muafi sold at auction The sale-proceeds were more than sufficient to satisfy his claim and a surplus amount of Rs 1,232 was left over and is still in deposit. Abbas Ali Khan claims that

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the present plaintiff Chote Lal can have no prior claim over this amount, that on the other hand Abbas Ali Khan himself, by virtue of having satisfied part of Chedan Lal's decree and the decree of Gauri Shankar, is entitled to a prior claim On the other hand, the learned advocate for Chote Lal contends that Abbas Ali Khan cannot be allowed to claim priority in respect of the whole amount which he paid, that is, the whole amount which he paid towards the discharge of previous mortgages, but that he must claim contribution only in respect of the excess amount which his village has been made to pay and, further, that that excess amount should be rateably distributed over all the villages I am unable to accept this contention advanced on behalf of Chote Lal It has already been held that by virtue of the payment of Ram Kunar's decree Chote Lal is entitled to the whole of the amount as a prior claim. On the same principle I must hold that Abbas Ali Khan having paid off the subsequent mortgage of Chedan Lal and Gauri Shankar has priority in respect of the whole amount paid by him as against Chote Lal who comes under a subsequent mortgage If any surplus were to be left over after the satisfaction of Abbas Ali Khan's claim, then the plaintiff Chote Lal may have a claim on it. In this view of the matter the plaintiff has no prior claim on the sum of Rs. 1,232 over which Abbas Ali Khan undoubtedly has a claim The plaintiff's claim for a declaration that he is entitled to withdraw this amount cannot, therefore, be allowed. On the other hand, Abbas Ali Khan having a prior claim is entitled to take out this money in part satisfaction of the amount paid by him on the prior mortgages The same remarks apply to the 10 biswas of Muhammadpur Muafi which had not yet been sold The plaintiff, as a matter of fact, claimed no priority as regards this

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The last contention of Abbas Ali Khan arises on account of the sale of the village Munda Khera. His contention is that Munda Khera having been sold and been made to pay more than its proportionate share, there ought to be a corresponding charge on the other villages sought to be sold by the plaintiff. It has, however, been already stated that the plaintiff has a prior claim on account of the decree of Ram Kumar. Abbas Ali Khan's rights arose after the mortgage, on the basis of which Ram Kumar's decree was obtained. He, therefore, cannot resist the plaintiff's claim The question of an adjustment of equities as between co-mortgagors can arise only in a subsequent suit for contribution.

Sulaiman, J.

In the course of argument the learned advocate for Abbas Ali Khan wanted to place reliance on a decree, dated the 28th of August, 1911, passed in the suit brought by Chote Lal himself on the basis of an earlier mortgage of his dated the 10th of March, 1908. He wanted to contend that the effect of that decree was to disallow Chote Lal's claim for priority and the same operates as *res judicata* The judgement in that case is not on the record The plea of *res judicata* on behalf of Abbas Ali Khan was not taken either in the court of first instance or before the learned Judges of this Court who first heard the appeal, nor is that plea to be found in the grounds of appeal before those learned Judges, nor in the grounds of appeal before us According to the well-established practice of this Court no point can be raised in Letters Patent Appeal which was not raised before the learned Judges who first disposed of the appeal. Furthermore, in the absence of the judgement in that case it is difficult to hold what was actually decided by the court The decree as it stands is not free from ambiguity. We have, therefore, not allowed

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this point to be raised. Similarly, the contention on behalf of Chote Lal that this decree operates as *res judicata* has also not been accepted.

I would, therefore, allow this appeal of Abbas Ali Khan in part to this extent that I would dismiss the claim of Chote Lal as regards the claim of Rs 1,232 representing the surplus of sale-proceeds of 10 biswas of Muhammadpur Muafi.

BY THE COURT.—We allow the appeal in part, modify the decrees of the Subordinate Judge and of this Court and dismiss so much of the claim of the respondent as relates to the sum of Rs 1,232 in deposit with the court. The appellant will receive and pay costs in proportion to his success and failure in all the three courts.

Appeal allowed in part.

REVISIONAL CIVIL.

1926
May, 28
June, 28

Before Mr. Justice Mukerji

SAHDEO SINGH AND OTHERS (PLAINTIFFS) *v.* MELHU SINGH AND OTHERS (DEFENDANTS) *

Civil Procedure Code, schedule II, paragraph 16, clause (1)—Arbitration—Award—Appeal—Revision

An award must be in conformity with clause (1) of paragraph 16 of schedule II of the Civil Procedure Code in order that a decree passed on it may be unappealable

Tursi v. *Basdeo* (1), followed *Ibrahim Ali* v. *Mohsin Ali* (2) and *Najm-ud-din Ahmad* v. *Puech* (3), referred to.

THE facts of this case were as follows:—

In a suit for recovery of rent, filed in a revenue court, the dispute was referred to arbitration and an

* Civil Revision No. 47 of 1926

(1) (1926) 24 A.L.J., 705. (2) (1896) I.L.R., 18 All., 422
(3) (1907) I.L.R., 29 All., 584

award was made On plaintiff's application contesting the award, the Assistant Collector refused to consider objections and passed a decree in accordance with the award. An appeal to the District Judge was dismissed on the ground that no appeal lay A second appeal was then filed before a single Judge of the High Court, who held that it could not be admitted as a second appeal, but that the memorandum of appeal might be treated as an application in revision. On this state of the record the application was laid before another Judge and a preliminary objection was raised by the opposite party that no revision lay. It was argued that, inasmuch as the decree passed by the Assistant Collector was appealable to the District Judge and the District Judge's decree was appealable to the High Court, the revision should be treated as a second appeal and the appeal be allowed

Dr *M L Agarwala* (for whom Munshi *Baleshwari Prasad*), for the applicants.

Pandit *Uma Shankar Bajpai*, for the opposite parties

The judgement of MUKERJI, J., after stating the facts as above, thus continued :—

In the case of *Kehri Singh* v. *Thirpal* (1), SULAIMAN and BOYS, JJ , held that a revision did lie, in certain circumstances, from a case in which the original suit was cognizable by the revenue court alone. In the recent case of *Bhagwat Das* v. *Chhedi Koeri* (2), a Bench of three Judges of this Court held that no revision lay in the circumstances of a case which were more or less similar to the case before me. Mr *Bajpai* takes his stand on this and argues that no revision lay

On the other hand, Mr *Baleshwari Prasad* contends that his case was originally an appeal and it ought to have been admitted as a second appeal. By

(1) (1925) I L R , 48 All., 104 (2) (1926) 24 A L J , 537

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implication, he challenges the correctness of the order of SULAIMAN, J

* * * * *

[An adjournment was granted on the request of Mr. *Bajpai*, and the case was taken up again by MUKERJI, J., on the 28th of June, when his Lordship concluded his judgement as follows —]

This revision came before me once and for reasons recorded on the 28th of May, 1926, I proposed to treat it as a second appeal, in which form it was originally filed. The learned counsel for the opposite party had intimated to me that he had not sufficient opportunity to consider this aspect of the case and the case was adjourned Today I have heard the learned counsel who holds the brief for the respondent's original counsel, and I have come to the conclusion that the revision must be treated as a second appeal and the second appeal must be allowed

An award must be an award in accordance with the provisions of paragraph 16, clause (1), of schedule II in order that a decree passed upon it may not be appealable This is perfectly clear from the language used in clause (2) of paragraph 16. The words are "upon the judgement so pronounced" The words "so pronounced" imply that the award should be one contemplated by clause (1) of paragraph 16. That clause contemplates an award with respect to which, if an application for setting it aside has been made, the application has been considered and refused. In this particular case an application to set aside the award was made, but was never considered by the learned Assistant Collector and therefore the award could not be the basis of an unappealable decree This was decided so long ago as in the year 1896 in *Ibrahim Ali* v. *Mohsin Ali* (1) by a Bench of six Judges of

(1) (1896) I L R., 18 All., 422.

this Court. The same opinion was expressed in *Najm-ud-din Ahmad* v. *Puech* (1). It is true that the Code of Civil Procedure underwent a substantial change in the year 1908 after those rulings were given But there has been no substantial difference in this portion of the law As recently as on the 27th of April, 1926, a Bench of two Judges in *Tursi* v. *Basdeo* (2), decided the same thing, viz., an award must be in conformity with clause (1) of paragraph 16 of schedule II of the Code of Civil Procedure in order that a decree passed on it might be unappealable.

The result is that the decree passed by the Assistant Collector was appealable to the District Judge and the District Judge's decree is appealable to this Court

I set aside the decrees of the courts below and remand the case through the lower appellate court to the court of first instance for hearing of the objections preferred by the plaintiffs and disposing of them according to law The costs here and hitherto will abide the result

Decree set aside and case remanded.

REVISIONAL CRIMINAL.

Before Mr Justice Banerji.

EMPEROR *v.* BAL CHAND ALIAS BALMUKUND AND OTHERS.*

1926 *August*, 18

Criminal Procedure Code, sections 337 *and* 215—*Pardon—Competence of magistrate to grant pardon not affected by postponement of case—Commitment—Power to quash —Act No I of* 1872 (*Indian Evidence Act*), *section* 133 *—Accomplice.*

The fact that a criminal case may be temporarily postponed does not in any way affect the power of the Magistrate

* Criminal Revision No 496 of 1926, from an order of S M Ishaq, Magistrate, First Class, of Azamgarh, dated the 2nd of July, 1926

(1) (1907) I L R , 29 All , 584 (2) (1926) 24 A L J , 705

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in charge of it to grant a pardon to the accused under section 337 of the Code of Criminal Procedure. *Kishori Gir* v *Ram Narayan Gir* (1), referred to.

Under section 215 of the Code of Criminal Procedure, it is only on a question of law that the High Court is justified in quashing a commitment.

The real test, in deciding as to whether there is evidence which could fairly be acted upon, is whether a Judge at a trial held with the aid of jurymen could say that there was no evidence which could go before a jury. *Abdul Karim* v. *Emperor* (2), *Akbar Ali* v. *Raja Bahadur* (3), and *Lachman* v *Juala* (4), referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

Mr. *F O. O'Neill*, for the applicants

The Assistant Government Advocate (Dr *M. Waliullah*), for the Crown

BANERJI, J. :—This is an application by three persons under section 215 of the Code of Criminal Procedure, praying that their commitment to the court of session for offences punishable under sections 120B and 457 read with section 381 of the Indian Penal Code be quashed. The learned counsel for the petitioners has taken three main points in this case :—

(1) That the pardon that was tendered to Kapur Chand was illegal.

(2) That the offence with which the accused are charged does not fall within the definition of housebreaking

(3) That there was no evidence to warrant the accused being committed to the court of session to stand their trial.

As regards the first point urged, Mr. *O'Neill*. on behalf of the petitioners, says that as the Magistrate

(1) (1903) 8 C W N , 77
(2) (1901) 1 A L J , 140
(3) (1926) 24 A L J , 133
(4) (1882) I L R , 5 All , 161.

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had, upon the application of three out of the five accused persons, postponed the case, he had become *functus officio*, and, therefore, could not under the provisions of section 337 of the Code of Criminal Procedure tender pardon to Kapur Chand He has based his argument on the ground that under section 526 (8) of the Code of Criminal Procedure the court had to adjourn the case and, having adjourned the case, the Magistrate could do nothing in the matter. I am of opinion that there is no force in this contention. Section 337 of the Code of Criminal Procedure does not require that a trial or an inquiry should be in progress when the pardon is tendered. The Magistrate was the only Magistrate who had jurisdiction to inquire into the case, and although he had postponed the investigation or inquiry he had not ceased to be the Magistrate who would be or was investigating or inquiring into the offence which the accused persons are said to have committed. My attention has been drawn to the case of *Kishori Gir* v. *Ram Narayan Gir* (1). I am of opinion that that case has no bearing on the question of the competency or otherwise of the Magistrate granting the pardon.

As regards the second point taken, I have not gone into the facts of the case to see whether the prosecution has made out a case or not; but, for the purpose of coming to the conclusion whether a charge under section 457 could or could not be framed against the accused, I have examined the allegation made on behalf of the prosecution against the accused. It is impossible for me to say that upon the statement of facts the court could not frame a charge under section 457 read with section 381. It will be a matter for the court trying the accused to decide what facts the prosecution have proved to bring the offence, if any, within the purview of that section

(1) (1903) 8 C W N, 77

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The third point which Mr. *O'Neill* has very strenuously argued before me is that I should quash the commitment under section 215 of the Criminal Procedure Code. Under that section it is only on a question of law that the High Court would be justified in quashing a commitment. It has also been urged by the learned counsel for the petitioners that if the case does not come within the purview of section 215, I should, acting as a court of revision under section 439, set aside the commitment. I decline to do so. I am of opinion that to test whether there is or is not evidence for a Judge to decide and to quash a commitment it is unnecessary to accept the evidence for the prosecution. Whether the evidence is believed or disbelieved at the trial is a matter with which I am not concerned. The main evidence against the accused, as it appears from the order of commitment, is that of one of the persons concerned in the theft who has been granted a pardon, and it is argued that, being an accomplice, his evidence is not entitled to weight. The real test in deciding as to whether there is evidence which could fairly be acted upon is to see whether a Judge at a trial held with the aid of jurymen could say that there was no evidence which could go before a jury. Whether an accomplice can be believed or whether the evidence of an accomplice has been corroborated is a matter for decision at the trial. I cannot, sitting as a revisional court, decide whether the statement of Kapur Chand should or should not be believed. Mr. *O'Neill* has referred me to a number of cases and he has submitted that the universal practice is not to believe the testimony of an approver unless it is corroborated in material particulars. One of the cases he has referred to in his argument is the case of

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Abdul Karim v *Emperor* (1) At page 113 I find the following observation of Mr. Justice BANERJI —

"I am, therefore, unable to regard him as an accomplice of such an exceptional kind as would justify the court in dispensing with the necessity of the confirmatory evidence which is ordinarily required in the case of an accomplice"

Section 133 of the Indian Evidence Act, to my mind, clearly lays down that the evidence of an accomplice alone can be acted upon, in spite of section 114, illustration (*b*) of the Evidence Act. It is thus impossible for me to hold that the evidence of an accomplice uncorroborated cannot be said to be evidence against an accused In fact, the ruling referred to above implies, to my mind, that an accomplice may give such evidence that no corroboration at all would be required. I am, therefore, unable to say that there is no evidence against the petitioners which could go to a jury

A number of other cases have been referred to but no useful purpose would be served by discussing all those cases

Mr *O'Neill* has pressed before me specially the case of Raja Singh and has argued that the Magistrate who committed the case to session did not believe implicitly the statement of the accomplice while dealing with the case of Raja Singh, and he has further submitted that the principle laid down in *Akbar Ali* v *Raja Bahadur* (2) has not been understood by the learned Magistrate I am unable to accept that contention The Magistrate has not taken upon himself the responsibility of disbelieving or believing entirely the statement of the approver, but Mr *O'Neill* argues that, inasmuch as the Magistrate has sought to find corroboration of the evidence of the approver it shows that he only partially believed the approver and did not implicitly rely on

(1) (1904) 1 A.L.J., 110 (2) (1925) 24 A.L.J., 133

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him. This will be a matter for the court that decides the case to consider, but I am of opinion that the function of a court of revision is not to sit in judgement over the order of a Magistrate committing a case to the court of session. Great stress has been laid before me on the case of *Lachman* v. *Juala* (1) What has been laid down by MAHMOOD, J., in that case has no bearing upon the present petition, inasmuch as the observations that were made were made upon an application by a complainant to set aside the findings of a Magistrate who had declined to commit the accused person to the court of session, and after examining the evidence and the circumstances of the case Mr. Justice MAHMOOD declined to act upon that evidence and to set aside the order of the Magistrate. For these reasons I am of opinion that there is no force in this application and I dismiss it.

Application dismissed.

REVISIONAL CIVIL.

Before Mr Justice Lindsay

1926
November, 1

CHEDI LAL AND ANOTHER (APPLICANTS) *v* JAWAHIR LAL (OPPOSITE PARTY) *

Act No. IX of 1887 *(Provincial Small Cause Courts Act), schedule II, article* 35—*Jurisdiction—Small Cause Court—Suit for return of specific goods*

On the occasion of the betrothal of two small children the father of the boy handed over certain ornaments to the girl's family, and it was agreed that, if the marriage was subsequently not carried out when the children reached the age of maturity, the ornaments were to be returned

Held, that a suit for the return of the ornaments so handed over was not excluded from the cognizance of a Court of Small Causes

* Application in Civil Revision No. 126 of 1926, from an order of Hanuman Prasad Varma, Small Cause Court Judge, Allahabad, dated the 5th of July, 1926.

(1) (1882) I L R, 5 All, 161

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CHEDI LAL v. JAWAHIR LAL

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Shiva Prasad Sinha*, for the applicants.

Maulvi *Akhtar Husain Khan* and Babu *Indu Bhushan Banerji*, for the opposite party.

LINDSAY, J. :—This application ought not, in my opinion, to succeed. The suit was a suit for return of certain ornaments on the allegation that there had been a breach of contract of a promise of marriage. The case for the plaintiff was that many years before the suit his son, whilst still an infant, was betrothed to the daughter of one of the defendants, also an infant It was alleged that at the time of the betrothal ornaments valued at Rs 394 were made over to the defendants for the girl, and it was agreed that, if the marriage was subsequently not carried out when the children reached the age of maturity, the ornaments were to be returned. The parties are *telis*, and it was pleaded that this was also a customary law of the tribe. The suit was resisted on various grounds. The defendants raised the plea that the suit was not cognizable by a Court of Small Causes and relied upon article 35 of the second schedule to the Provincial Small Cause Courts Act. The Judge says that this article cannot be applied, and I think he is right The suit was not a suit for recovery of compensation for breach of contract for betrothal or promise of marriage; it was a suit for return of specific goods The only other point pressed is that the court below ought to have held that the ornaments were not made over to the defendants but were made over to the girl I agree with the Judge of the court below that in the circumstances the ornaments could not become the *stridhan*

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of the girl and I am satisfied that the defendants were liable to be sued for the return of the ornaments I dismiss the application with costs

Application dismissed with costs.

MISCELLANEOUS CRIMINAL.

Before Mr Justice Iqbal Ahmad.

1926 *November*, 8

BASDEO MISRA (APPLICANT) *v* BADAL MISRA AND OTHERS (OPPOSITE PARTIES).*

Criminal Procedure Code, section 526—Transfer—Act (Local) No VI of 1920 (United Provinces Village Panchayats Act)—Power of High Court to transfer a criminal case pending before a panchayat

The High Court has power to transfer a criminal case pending before a panchayat constituted under Local Act No VI of 1920. *Sat Narain* v *Sarju* (1) and *Emperor* v. *Kamlapati* (2), referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Sheo Dihal Sinha*, for the applicant.

Pandit *A. P. Pande*, for the opposite parties.

The Government Advocate (Mr. *G. W. Dillon*), for the Crown.

IQBAL AHMAD, J. —This is an application for transfer of a case under section 323 of the Indian Penal Code (*Basdeo Misra* complainant v. *Badal Misra* and others) pending in the panchayat at Sonbarsa.

A preliminary objection is taken to the hearing of this application, on the ground that a panchayat constituted under the provisions of Act VI of 1920 (United Provinces Village Panchayats Act) is not a court within the meaning of chapter II of the Code

* Criminal Miscellaneous Application No 249 of 1926, for transfer of a case from a village panchayat

(1) (1929) I L R , 16 AP , 167 (2) (1925) I L.R , 48 All., 23

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of Criminal Procedure, and as it is not a criminal court within the meaning of that Act, section 526 of the Code of Criminal Procedure has no application, and as such this Court has no jurisdiction to transfer a case pending before a panchayat

The matter was considered by a Division Bench of this Court in the case of *Sat Narain* v. *Sarju* (1). One of the learned Judges was of opinion that a panchayat constituted under the provisions of the Local Act referred to above is not a "criminal court" and as such this Court has no jurisdiction under section 526 of the Code of Criminal Procedure to transfer a case pending before a panchayat. He was further of opinion that section 22 of the Letters Patent did not vest jurisdiction in this Court to transfer a case from a village panchayat The other learned Judge constituting the Bench was of a contrary opinion He held that the village panchayat must be deemed to be a court for the purpose of section 22 of the Letters Patent, and as such "the High Court has power under that section to transfer any criminal proceeding pending before the village panchayat to another village panchayat empowered to take cognizance thereof"

The same question arose for consideration in the case of *Emperor* v *Kamlapati* (2), and the learned Judges constituting the Bench made the following observation :—

"But as we had to consider at some length the question of the jurisdiction of this Court, we think that we should make some observations in regard thereto, though we are not unaware that those observations will be in the nature of *obiter dicta* We should have little hesitation in coming to the opinion that a village panchayat constituted and held under

(1) (1923) I L R, 46 All. 167 (2) (1925) I L R, 48 All. 23

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Local Act No VI of 1920 is a 'court' and when it is dealing with a case in regard to an 'offence' that it is a criminal court "

Though the observations quoted above are in the nature of *obiter dicta* still they are entitled to the greatest weight.

The main reason assigned by one of the learned Judges who decided the case of *Sat Narain* v. *Sarju* (1) for holding that section 526 of the Code of Criminal Procedure has no application to village panchayats was that such a panchayat was not a "criminal court" within the meaning of chapter II of the Code of Criminal Procedure. In view of the observations quoted above, to be found in *Emperor* v. *Kamlapati* (2), the reasoning of the learned Judge who held that this Court had no jurisdiction to direct the transfer of a case of a panchayat loses much of its weight. Section 5 of the Code of Criminal Procedure prescribes that all offences under the Indian Penal Code shall be "investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained" I am not sure if this Court does not "otherwise deal with offences under the Indian Penal Code" when this Court, in the exercise of the powers vested in it by section 526 of the Code of Criminal Procedure, transfers a case from one court to another, and I am inclined to the view that by section 5 of the Code of Criminal Procedure, read with section 526 of the same Code, this Court has jurisdiction to transfer cases from village panchayats

For the reasons given above, I am of opinion that I have jurisdiction to deal with this matter.

After going through the affidavits filed and hearing the learned counsel for the parties I have come to the conclusion that this is a fit case which

(1) (1923) I.L.R., 46 All., 107 (2) (1925) I.L.R., 48 All., 23

ought to be transferred from the panchayat court to some other court competent to try the same

I direct that the case under section 323 of the Indian Penal Code (*Basdeo Misra* complainant v. *Badal Misra* and others) be transferred from the panchayat court at Sonbarsa to the court of the District Magistrate of Ballia, who will make over the case for trial to some other Magistrate subordinate to him and competent to take cognizance of the offence mentioned in the complaint.

Case transferred.

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Sulaiman.

RAM DAYAL AND OTHERS (DEFENDANTS) *v.* SARASWATI AND ANOTHER (PLAINTIFFS).* 1926 *November*, 9

Act No. I of 1877 (*Specific Relief Act*), *section* 9—*Suit for possession of immovable property—Suit based on a possessory title brought after six months from dispossession*

Even independently of section 9 of the Specific Relief Act, 1877, a person who has been ousted by a trespasser from the possession of immovable property to which he had merely a possessory title is not debarred from bringing a suit in ejectment on the basis of his possessory title even after the lapse of six months from the date of dispossession. *Wali Ahmad Khan* v *Ajudhia Kandu* (1), followed *Lachman* v *Shambhu Narain* (2), distinguished

This was a defendants' appeal arising out of a suit for a declaration of title and in the alternative for possession as trustees over four items of property.

The plaintiffs' case was that these properties were the private property of Salig Ram, the father

* First Appeal No 274 of 1923, from a decree of Maulvi Mohan Sanyal, Subordinate Judge of Agra, dated the 30th of April, 1923

(1) (1891) I L R, 13 All, 537. (2) (1910) I L R, 33 All, 174

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of Musammat Saraswati, and that Salig Ram made a gift of these properties on the 5th of November, 1905, in her favour Plaintiff No 2 joined in the suit on the basis of the gift. The reliefs claimed by the plaintiffs were (1) a declaration that they were owners of the entire estate and that the defendants or the public had no right of interference with it, and (2) that even if any portion of the properties be declared to be endowed property the plaintiffs should be granted possession as managers and mutawallis

The plaintiffs alleged that Salig Ram and after him the plaintiffs had been in peaceful and undisturbed possession up to the 8th of November, 1921, when the defendants forcibly took possession of the temple and the other properties and turned out the plaintiffs' servant Jagannath.

The defendants denied that any of these properties was the private property of the plaintiffs and pleaded that they were a public trust. It was not disputed that the defendants had taken forcible possession of these properties, but it was urged that the plaintiffs had committed a breach of trust and had proved themselves incompetent.

The Subordinate Judge found that all the items of the properties in dispute were the properties of the plaintiffs which they had acquired from Salig Ram. He accordingly decreed the claim *in toto*.

The defendants appealed

Dr *M. L. Agarwala*, Dr. *Surendra Nath Sen* and Munshi *Panna Lal*, for the appellants.

Mr. *B. E. O'Conor* and Munshi *Narain Prasad Ashthana*, for the respondents

The judgement of the High Court (LINDSAY and SULAIMAN, JJ), after setting out the facts of the case as above, discussed the evidence relating to the

various items of property concerned and proceeded as follows :—

As regards the temple, the muafi land and the house it seems to us wholly unnecessary in this case to decide whether they are held under a public trust or a private trust. As remarked previously, the plaintiffs came to court with an alternative case that these properties were a private trust. The defendants have taken possession of these properties forcibly and are trespassers. They have absolutely no right to dispossess the plaintiffs, who had been in peaceful possession for a very long number of years. We do not, therefore, think that this is a proper suit in which the question of the true nature of the endowment should be determined finally. In a properly constituted suit brought by public persons having a real interest in the endowment the question whether the property is of a public or a private nature can be determined hereafter This point, therefore, we leave open

We are clearly of opinion that even if the property is a public trust and not merely a private trust the decree for possession in favour of the plaintiffs must be maintained The suit, no doubt, was not brought under section 9 of the Specific Relief Act but, as was pointed out by the Full Bench in the case of *Wali Ahmad Khan* v *Ajudhia Kandu* (1), "even independently of section 9 of the Specific Relief Act a person, who has been ousted by a trespasser from the possession of immovable property to which he had merely a possessory title, is not debarred from bringing a suit in ejectment on the basis of his possessory title even after the lapse of six months from the date of dispossession." The recent Full Bench case of *Lachman* v. *Shambhu Narain* (2), is clearly

(1) (1891) I L R, 13 All, 537 (2) (1910) I.L R, 33 All, 174

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distinguishable, inasmuch as it was found in that case that the defendants had actual title to the property of which they had forcibly taken possession from the plaintiffs. BANERJI, J., at page 181, remarked —"Of course, in some instances, previous possession may afford evidence of title and where the defendant is a trespasser and the plaintiff was in continuous and peaceful possession he would be entitled to retain such possession." We, therefore, think that in justice and equity the plaintiffs must be restored to the possession of these properties.

The last contention urged on behalf of the appellants is that in view of the assertion of proprietary title made by the plaintiffs in the plaint they have disqualified themselves from any right to obtain possession. Reliance was placed on the Privy Council case of *Srinivasa Chariar* v. *Evalappa Mudaliar* (1). That case, in our opinion, has no application, for it was a suit brought under section 92 of the Code of Civil Procedure, by persons interested in trust property against trustees who by reason of their assertion of private rights were found to be disqualified and fit to be removed. The present case is not a suit under section 92 and the question of the plaintiffs having committed any breach of trust or not does not arise.

We accordingly uphold the decree for possession passed by the Subordinate Judge with this modification that we dismiss the plaintiffs' claim for declaration of proprietary title with regard to items Nos. 1, 2 and 4 mentioned in the plaint, but we do maintain the declaration given by the court below with regard to item No. 3. The decree for possession of the entire property is maintained.

Decree modified.

(1) (1922) I L R., 45 Mad., 585.

Before Mr Justice Dalal and Mr. Justice Pullan.

GULAB RAI AND ANOTHER (DEFENDANTS) *v.* GIRWAR SINGH (PLAINTIFF) AND TIKA RAM AND OTHERS (DEFENDANTS) * 1926 November, 22.

Bengal Regulation No XI of 1825 *(Alluvion and Diluvion) —Custom determining boundary of estates divided by a river*—Dhardhura—*Sudden or gradual accretion.*

If it is satisfactorily proved that the custom of *dhardhura* subsists as between the owners of contiguous estates divided by a river, it is no reason for not applying the custom that in a particular instance it may seem to press hardly on one side or the other, e.g , on account of a very considerable or sudden change in the course of the stream *Isree Singh* v *Mirza Shurfoodeen* (1) and *Shohrat Singh* v *Ghulam Ezid* (2), referred to

THE facts of this case, so far as they are material for the purposes of the present report, appear from the judgement of the Court.

Dr *Surendra Nath Sen*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents

DALAL and PULLAN, JJ. :—This appeal arises from a suit brought by the owners of the village lands of Jia Nagla to recover from the owners of the village lands of Timaria Ghat a considerable area of land transferred from one side of the Mahewa river to the other as the result of a change in the course of the stream. The plaintiff Girwar Singh himself admits that the custom of *dhardhura* prevails between the villages of Jia Nagla and Timaria Ghat, and there is abundant documentary evidence dating back to the first settlement to prove this fact. The meaning of the custom of *dhardhura* is that the deep stream is to be regarded as the boundary between two

* First Appeal No 322 of 1923, from a decree of Rup Kishan Agha, Subordinate Judge of Budaun, dated the 24th of March, 1923

(1) (1869) 1 N W P, H C R, 224 (2) (1920) 18 A L J, 195

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villages The custom is sanctioned in the Bengal Alluvion and Diluvion Regulation, XI of 1825, which lays down in the second section that "whenever any clear and definite usage . . may have been immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on one side and accession on the other) the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties" In the present case immemorial usage is established by the old settlements, and it is not denied that on several occasions in the past, land cut off by the river has been incorporated in the opposite village

The learned Subordinate Judge has decreed the plaintiff's suit and restored to him land which is now on the opposite side of the river, not because the custom of *dhardhura* does not apply to these villages, but because in his opinion the custom cannot be intended to cover the present case. Undoubtedly the decision of the learned Judge was affected by his personal opinion that the whole custom is inequitable, being "an aggravated form of gambling in which not only who wins or loses, but also the amount of the stake, is left to be determined by the caprice of a river due to natural causes." We need only point out that there is another side to the picture. By allowing their constantly shifting boundary to be determined by natural, or possibly in their opinion supernatural, causes, the parties have for many years, perhaps centuries, lived together in peace, without bloodshed and without litigation. If this

is gambling, it is at least fair gambling in which neither party can take an advantage of the other.

The Judge seeks to base his view that the whole custom is inequitable on a decision of the Allahabad High Court of the year 1869—*Isree Singh* v. *Mirza Shurfoodeen* (1). This ruling will not justify condemnation of the whole custom, but only its application to cases where there has been a sudden and not a gradual accretion, and so he argues that the accretion in the present case was brought about by abnormal circumstances, whereas the custom must refer only to normal circumstances. We have perused the judgement in the case of *Isree Singh* v *Shurfoodeen* (1) and we find that the Judges were of opinion that the custom of *dhardhura* when applied to lands gained otherwise than by gradual accretion is opposed to equity, " and it is doubtful how far in extreme cases in which it would lead to the transfer of large tracts of land, the courts would be warranted in applying it." From this they go on to say that they would not be at liberty to admit the plaintiffs' claim " unless similar claims in similar cases in their neighbourhood were shown to have been heretofore admitted " The case was twice remanded, but the evidence of previous examples was held to be insufficient to prove the custom, and the suit failed on this account. The judgement is, therefore, not a clear authority for the view that *dhardhura* cannot apply to cases of a sudden and considerable diversion of a stream.

Nor is the reference of the learned Judge to the more recent decision of this High Court in *Shohrat Singh* v. *Ghulam Ezid* (2), more helpful to his argument In that case it was found that the evidence did not establish the existence of any custom of *dhardhura*, and a decision based on the non-existence of

(1) (1869) 1 N.-W.P., H.C.R., 321 (2) (1920) 18 A.L.J., 195

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the custom can be no authority in a case where the custom is not only proved but admitted.

Thus we have to decide merely whether the lower court in the absence of authority was justified in finding that the custom of *dhardhura* only applies "to the shifting of the main channel of a stream from one side to another in the much wider sandy bed," and not to more violent changes brought about by outside agency. We may say at once that the change of river bed of the Mahewa took place in the year 1326F., and probably again in the two succeeding years, owing to the action of the neighbouring river Ganges, which broke one of the embankments constructed either in the Moradabad or Aligarh district. The exact nature and position of the breach is not clearly explained, but it is hardly material for the purpose of determining this appeal. We have referred to the District Gazetteer of Budaun published in 1907, and find the following passages. At page 8, writing of the Ganges, the author observed:—"Numerous islands occur along its course, and as the deep stream rule prevails, they are apt to be transferred from one district to another several times within the course of a few seasons" Of the Mahewa he writes at page 9:—"The Mahewa, which originally was nothing but a local drain, now acts as an overflow channel of the Ganges, owing to changes that have occurred in Moradabad. Consequently, before it enters this district, its narrow and often tortuous bed is filled to overflowing, with the inevitable result of serious flooding when the stream is swollen by the drainage brought down along its small tributaries These inundations fill the whole of the Mahewa valley, and the country is swept by a destructive rush of water, which leaves nothing behind but damage on every side . . . In many

places the river by its efforts to straighten its winding course, has cut away much good land, carving for itself experimental channels and then abandoning them." Further, at page 16, we find —" The worst damage is done by the Mahewa which frequently destroys good land and leaves behind it a barren silt In former days serious floods in this river seldom occurred, but about 1871 a large volume of water was transferred from the Ganges into the Mahewa channel." A reference to the map shows that the Mahewa is so close to the Ganges during its course in the Budaun district that it must always have been endangered by the floods of that river, and we have the authority of the Gazetteer for holding that the floods of the Mahewa caused by the Ganges have been severe at least since 1871 After that date there was a settlement in which the condition of *dhardhura* was affirmed both in Jia Nagla and in Timaria Ghat, and it seems idle to suppose that the riparian owners affirmed the custom in the belief that it would not prevail when the Mahewa altered its course on account of the action of its larger neighbour We are also doubtful whether the changes in the " much wider sandy bed " have any reality, in view of the reference in the Gazetteer to the narrow and tortuous bed of the stream

We find that in the present case the floods originating with the Ganges have changed the course of the Mahewa to such an extent that in the course of three seasons 136 bighas of land have gone over from the Jia Nagla side of the river to that of Timaria Ghat Previous khewats show no such large accretion in the past, but the mere extent of the land transferred cannot be the factor to determine whether the custom of *dhardhura* proved to be in existence

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can be enforced. Considerable losses are contemplated by the Government which allows a zamindar, who loses 5 per cent of his whole estate, to obtain remission of land revenue. Another suggested distinction is between sudden and gradual accretion. But this is a difficult test to apply to these Indian streams Their action is always the same. They swell from little or nothing to a flood extending sometimes for miles. When the flood subsides it is seen that the channel has changed; we find it impossible to say that an accretion so caused is gradual, and we do not believe that the riparian owners who affirmed the custom intended to restrict its operation to gradual accretion On the contrary we are of opinion that they had no more clear idea of a gradual accretion than the plaintiff Girwar Singh, when he tried to explain it in court, and could only say that it meant the erosion of a yard or two.

We appreciate the careful consideration given to this case by the learned Subordinate Judge, and his wish to avoid doing what he believed to be an injustice, but in our opinion his view was mistaken. The custom of *dhardhura* has been proved to exist as between the two contesting parties. It must be applied whenever the river by changing its course throws land from one side to the other. It applies to the present case, therefore, although the reason for the change in the course of the Mahewa river is to be found in the action of the Ganges. All customs of this nature involve occasional hardship for one side or the other, but that is no reason for the abrogation of the custom by a court.

In our opinion the land so transferred to the opposite bank of the Mahewa has become part of the village land of Timaria Ghat, and the plaintiffs are not entitled to recover it.

We allow the appeal with costs, and order that the suit be dismissed with costs.

Appeal allowed.

Before Mr. Justice Dalal and Mr Justice Pullan

MAHARAJ HARI RAM (DECREE-HOLDER) *v* SRI KRISHAN RAM (JUDGEMENT-DEBTOR) *

1926 *November*, 24

Act No V of 1920 (*Provincial Insolvency Act*), *sections* 27, 28, 31 *and* 48—*Insolvency—Discharge of insolvent not automatic—Insolvent not exempt from arrest in execution of decree*

Held, that without an order of the Insolvency court an insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge *Abraham* v *Sookias* (1), referred to

Held also, that an undischarged insolvent is not exempt from arrest in execution of a decree against him *Radhey Shum* v *Hakim Sayed Mohammad Taqi* (2), refered to

THE facts of this case, so far as they are necessary for the purposes of the present report, appear from the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the appellant

Munshi *Gadadhar Prasad* and Munshi *Mokshada Prasad*, for the respondent

DALAL and PULLAN, JJ —A decree-holder applied for the arrest of the judgement-debtor, who was an insolvent, and it was granted by the execution court,—the Subordinate Judge On appeal the learned District Judge held that in consequence of an order of adjudication in favour of the judgement-debtor passed by the Insolvency court under section 27 of the Provincial Insolvency Act, the respondent

* Execution Second Appeal No 1881 of 1925, from a decree of Ali Ausat, District Judge of Ghazipur, dated the 9th of September, 1925, reversing a decree of Raj Bihari Lal, Subordinate Judge of Ghazipur, dated the 11th of July, 1925

(1) (1923) I L R, 51 Calc, 887 (2) (1922) 72 Indian Cas 911

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was protected from arrest. The decree-holder has come here in second appeal. It was first argued that the application for execution was time barred, because the insolvent was automatically discharged six months after the order of adjudication, that is, on the 13th of November, 1921 The application was made by the appellant on the 2nd of March, 1925. We are of opinion that the provisions of section 43 of the Insolvency Act do not contemplate any automatic discharge A Bench of the Calcutta High Court was of that opinion in *Abraham* v. *Sookias* (1). Without an order of the Insolvency court the insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge.

In section 28 of the Provincial Insolvency Act the effect of an order of adjudication is described and protection from arrest in execution of a decree is not provided If it had been the intention of the Legislature to protect insolvents, the provisions of section 31, which permit an insolvent to apply to the Insolvency court for a protection order, would have been superfluous We find that one of the learned Judges of this Court, Mr. Justice DANIELS, held in Oudh that under the present Act the creditor can proceed to arrest as if no adjudication had taken place: *Radhey Shiam* v. *Hakim Saiyed Mohammad Taqi* (2). The first court was correct in its opinion. We set aside the decree of the lower appellate court, restore the decree of the first court and decree this appeal with costs of all courts

Appeal decreed

(1) (1923) I L R, 51 Calc, 397 (2) (1922) 72 Indian Cases, 911.

Before Mr. Justice Dalal and Mr Justice Pullan

MANGAT (DEFENDANT) *v* BHARTO (PLAINTIFF) AND HARGYAN AND ANOTHER (DEFENDANTS) * 1926 November, 29

Act No XV of 1856 (*Hindu Widows Re-marriage Act*), *section* 2—*Hindu widow—Widow entitled to re-marry prior to* 1856

The provision contained in section 2 of the Hindu Widows Re-marriage Act, 1856, whereby a Hindu widow on re-marriage forfeits all her rights and interests in her deceased husband's property does not apply to a Hindu widow who was permitted to re-marry prior to 1856 *Gajadhar* v *Kaunsilla* (1), followed.

THE facts of this case sufficiently appear from the judgement of the Court

Munshi *Narain Prasad Asthana*, for the appellant

Dr. *Surendra Nath Sen*, for the respondents.

DALAL and PULLAN, JJ. —For the purposes of this second appeal, it must be held that the plaintiff. Musammat Bharto, is the daughter of Musammat Rukmin by Hari Ram This was disputed by the defendant, but both the subordinate courts held in favour of the plaintiff The next point is whether the suit for declaration by the plaintiff that the deed of gift executed by Musammat Rukmin in favour of defendants Nos. 1 and 2 was not binding on her was time-barred or not It was argued that Musammat Rukmin lost her right to hold her husband's estate for her life on her re-marriage, and as she continued in possession she became owner by adverse possession after a lapse of twelve years Reference was made to section 2 of the Hindu Widows Re-marriage Act (Act No XV of 1856), which enacted that a Hindu widow

* Second Appeal No 910 of 1924, from a decree of Abdul Hakim, Additional District Judge of Meerut, dated the 12th of April, 1924, confirming a decree of Hargovind Bajal, Subordinate Judge of Muzaffarnagar, dated the 3rd of December, 1923

(1) (1906) I L R , 31 All , 161

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on re-marriage forfeited all her rights and interests in her deceased husband's property. This Court, however, has held repeatedly that this forfeiture does not apply to a Hindu widow who was permitted to re-marry prior to 1856. All the previous judgements are referred to at page 165 of a Bench ruling of this Court in *Gajadhar* v *Kaunsilla* (1). Mr. Justice BANERJI, who delivered the judgement of the Court felt himself bound by the previous rulings. His personal opinion appears to be that the rulings of the Calcutta and Madras High Courts more correctly interpreted the law. We are in the same position and are not prepared to refer the matter to a Full Bench after this Court has taken one view for a long series of years.

It was next argued that a Jat of the class to which Musammat Rukmin belonged was not permitted to re-marry prior to 1856. The learned Judge of the lower court has examined the evidence on page 12 of the printed book. We agree with him that the wajib-ul-arz did not record any custom confined to Jats alone because the co-sharers of the village belonged to communities other than Jats as well as Jats. The learned Judge referred to the evidence of Pirthi Singh, witness for the defence, who deposed that a Hindu widow in the village in which the parties lived never forfeited her right to her deceased husband's property by her re-marriage.

Musammat Rukmin was, therefore, a life holder and did not start any adverse title by her re-marriage.

We dismiss the appeal with costs.

Appeal dismissed.

(1) (1908) I.L.R., 31 All., 161

APPELLATE CRIMINAL.

Before Mr Justice Dalal and Mr. Justice Boys

EMPEROR *v.* BHIRGU SINGH.

1925 *December* 21

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), section* 147*—Citation—Failure to attend in accordance therewith—Act No XLV of* 1860*, section* 174

The issue of a citation to an alleged defaulter under section 147 of the United Provinces Land Revenue Act, 1901, does not involve him in any legal liability to attend, and non-compliance with it does not render him guilty of an offence under section 174 of the Indian Penal Code

THIS was an appeal by the Local Government against an order of the Sessions Judge of Azamgarh acquitting one Bhirgu Singh of an offence under section 174 of the Indian Penal Code The facts of the case are fully stated in the judgement of the High Court.

The Government Advocate (Babu *Lalit Mohan Banerji*), for the Crown.

Pandit *Narmadeshwar Prasad Upadhya*, for the accused

DALAL and BOYS, JJ —In this case one Bhirgu Singh was tried summarily by a Magistrate of the first class and convicted under section 174 of the Indian Penal Code The offence alleged against him was that, being legally bound to attend at a certain place and time in obedience to a summons, notice or order from a public servant, he had intentionally omitted to attend In this case the public servant who issued the direction to attend was a Tahsildar, and the direction purports to have been issued under section 147 of the United Provinces Land Revenue

* Criminal Appeal No 821 of 1925, by the Local Government, from an order of Kameshwar Nath, Sessions Judge of Azamgarh, dated the 27th of July, 1925

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Act That section says that "when an arrear of revenue becomes due, a writ of demand calling on the defaulter to pay the amount within a time therein stated or a citation to appear may issue." It was alleged on behalf of the Crown that a citation had issued. A Tahsildar has power to issue the citation. The only question that arises in the case is whether the power to issue citation connotes a legal liability on the part of the person to whom the citation is issued to attend. The Board of Revenue has framed a form which embodies both the writ of demand and the citation in one document, and the following form was used :—

"Whereas a sum of Rs on account of arrears of instalment in respect of is due against you, you are hereby directed (*hidayat*) that in case the entire arrears aforesaid and process-fee in respect of this summons are not paid immediately you should appear before this court at on ."

A foot-note to this document says that "Failure to attend shall be punishable under section 174 of the Indian Penal Code" The document is, further, headed "Summons requiring attendance" (in vernacular "*summon hazri*")

Two things may be noted about this document The first is that by embodying the writ of demand and the citation in the same form the Board of Revenue in practice deprived themselves of the option of sending either a writ of demand or a citation, but if they have chosen to deprive themselves in practice of that option there is nothing illegal in their so doing.

The second point to be noted is that in two places the vernacular word used is "*summons*" and the foot-note declares omission to comply to be punishable

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under section 174 of the Indian Penal Code. To give full force to the use of the word "summons" and the foot-note would be to beg the question which we have to decide, and if omission to comply is not punishable by law, a mere declaration in the form that it is punishable will clearly be wholly ineffective. The question is whether there is any different effect to be given to the use of the word "citation" in section 147 and to the use of the word "summons" As we have said, the Magistrate found the accused guilty under section 174 of the Indian Penal Code. On appeal he was acquitted by the learned Sessions Judge and from that acquittal the Local Government has filed the present appeal. On behalf of the opposite party it has been pointed out to us that in the North-Western Provinces Act (Act XIX of 1873), section 151, there was only a provision for a writ of demand. There was no power to issue either a citation or a summons In the Oudh Act (No. XVII of 1876), section 114, there was provision for a writ of demand or a "summons" to appear, while finally in the present Act No III of 1901, section 147, in which both the previous Acts are combined, there is provision for a writ of demand or a "citation" It is not unreasonably urged that there must have been some good reason for the use of this word "citation" which did not appear in the North-Western Provinces Act or any other word of the like nature and which did not appear in the Oudh Act, in which the word "summons" was used It can hardly be an accident and we cannot treat it as such We are urged to give this word its ordinary meaning, that is, that it is rather in the nature of an invitation to appear than of an order to attend We think that it is reasonably contended that its meaning is analogous to its meaning when used in the Probate and Succession Act where it

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amounts merely to an invitation to come and see the proceedings. Reference may be made to Act V of 1881 (Probate and Administration Act), section 69, and the Succession Act, sections 199 and 250. It is true that in testamentary matters where there are definite proceedings going on, invitation to come and see may well be issued to parties interested, while in the matter before us it might be said that there are no proceedings for anybody to come and see. But it does not appear to us unreasonable that Government should have contemplated the issue of a notice to an apparent defaulter inviting him to come and discuss the matter. There might be some question of dispute or uncertainty in regard to the amount due as shown by the account prepared under section 145 of the United Provinces Land Revenue Act. It might be possible that if the apparent defaulter went to see the Tahsildar some arrangement might be arrived at by which a delay in payment might be accepted. These are only two considerations that occur to us. It is quite possible that Government may have contemplated that in many cases immediate arrest might by negotiations be avoided. We think, therefore, that a meaning can properly be given to the word "citation" without attributing to it the full force of a "summons". It is further clear that if a person has been given an opportunity, even though he is not obliged to take advantage of that opportunity, of going to the authorities and discussing the matter and he refuses to take advantage of that opportunity, he can have nobody to blame but himself if the authorities proceed to the extremity of arresting him. Finally, our attention is drawn to the provisions of section 193 which expressly declare that a person who has received a "summons" to appear "shall be bound to attend". The Legislature can hardly have overlooked the fact

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that section 147 provided for a citation to appear and if it had intended that an unnatural construction should be put upon the word "citation," namely that it involved legal liability to attend, it would naturally have inserted also the word "citation" in section 193

For these reasons we hold that the issue of a citation to an alleged defaulter under section 147 of the United Provinces Land Revenue Act does not involve him in any legal liability to attend, that the opposite party here was, therefore, not guilty of an offence punishable under section 174 of the Indian Penal Code and was rightly acquitted by the learned Sessions Judge The appeal is, therefore, dismissed.

Appeal dismissed

Before Mr Justice Banerji

EMPEROR *v* ENAYAT HUSAIN *

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July, 2.

Criminal Procedure Code, section 297—Charge to jury—Misdirection—Appeal

An Assistant Sessions Judge in trying a case under section 377 of the Indian Penal Code with a jury, when he came to sum up, apparently did not give a summary of the evidence, but only told the jury that there were discrepancies in the evidence, without pointing out what these discrepancies were. Further, the Judge in charging the jury more than once used the expression "If you are morally convinced, your verdict should be that of guilty"

Held, that this amounted to a misdirection, and that the conviction should be set aside

This was an appeal from a conviction and sentence which had been passed by the Assistant Sessions Judge of Bareilly in a case under section 377 of the Indian Penal Code, tried with a jury The facts of the case, so far as they are necessary for the purposes

* Criminal Appeal No 325 of 1926, from an order of C Deb Banerji, Assistant Sessions Judge of Bareilly, dated the 7th of April, 1926

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of this report, appear from the judgement of the Court.

Maulvi *Mushtaq Ahmad*, for the appellant.

The Government Pleader (Mr *Sankar Saran*), for the Crown.

BANERJI, J. —Enayat Husain has been convicted under section 377 of the Indian Penal Code and sentenced to five years' rigorous imprisonment. The trial was before an Assistant Sessions Judge with a jury.

The only question is whether there was a misdirection in this case The heads of charge, as noted down by the learned Judge, do not give a summary of the evidence nor does it show at all whether the learned Judge did or did not do anything more than say to the jury that there were material discrepancies; and whether those discrepancies were brought to the notice of the jury or whether the Judge simply told the jury that there were discrepancies does not appear from the record. Further, the Judge in charging the jury has more than once used the expression: "If you are morally convinced, your verdict should be that of guilty." Then the Judge records that he agrees with the unanimous verdict of the jury as regards Enayat. He goes on to say. "There are some doubts, no doubt, but then the doubts are not strong enough to impel me to make a reference to the High Court"

The first point to consider is whether there has been or has not been a misdirection. I am of opinion that there has been a misdirection in this case. Under section 297 of the Code of Criminal Procedure, it is the duty of the Judge to sum up the evidence for the prosecution and the defence. In this case there was no evidence for the defence. I am of opinion that a Judge should explain to the jury the

issues of fact which the jury has to determine upon the charge upon which the prisoners are being tried, and, having made the jury understand these issues, the more convenient mode of summing up the case for him to adopt is, in my opinion, to present to the jury, as materially and impartially as he can, a summary of the evidence and the considerations and inferences to be drawn from the evidence and as they appear both on the negative and the affirmative sides of the case. It is impossible, of course, for any Judge to state every item of the evidence or to draw the attention of the jury to every fact which has been deposed, but he can without difficulty give a summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side or on the other. Merely telling the jury that there are material discrepancies without telling them about those discrepancies is, in my opinion, a clear misdirection Further, telling a jury, in a case under a section like section 377, over and over again about the moral conviction as to the guilt of the accused is also, in my opinion, a misdirection The jury has not to return a verdict of guilty upon their moral belief of a case, but upon the legal proof of the facts constituting the offence. I am, therefore, of opinion that the misdirection by the Judge has occasioned failure of justice I, therefore, set aside the conviction and sentence, and direct a re-trial of Enayat Husain by the Assistant Sessions Judge and a jury

Conviction quashed

APPELLATE CIVIL.

Before Mr. Justice Kanhaya Lal and Mr. Justice Ashworth.

1926 July, 5

SUKHBIR SINGH AND OTHERS (APPLICANTS) *v* SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY) *

Act No I of 1894 *(Land Acquisition Act), section* 18—*Reference based on applications not in compliance with law—Refusal of Judge to entertain reference.*

Where a Collector in a matter under the Land Acquisition Act, 1894, acted upon an application which was not in accordance with the provisions of the Act and did not justify his making a reference, and made a reference to the District Judge, it was *held* that the Collector was not competent to waive the requirements of the Act and the District Judge was right in refusing to take action on a reference so made. *In the matter of Government* v. *Nanu Kothare* (1) and *Ezra* v *Secretary of State for India* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court

Mr. *A Sanyal* and Munshi *Girdhari Lal Agarwala*, for the applicants.

Mr. *G W. Dillon*, for the respondent.

KANHAIYA LAL and ASHWORTH, JJ. :—These two appeals arise out of references under section 18 of the Land Acquisition Act. Under section 9 of the Land Acquisition Act (I of 1894) notice was given by the Collector to the appellants that Government intended to take possession of their land for the purpose of a market at Muzaffarnagar. Both the appellants replied to this notice stating that they were not willing to give the land for the construction of the market and that no public market was required. They further stated that they had submitted a memorial to

* First Appeal No 228 of 1923, from a decree of H J. Collister, Additional Judge of Meerut, dated the 27th of January, 1923.
(1) (1905) I L R , 30 Bom , 275 (2) (1905) I L R , 32 Calc., 605.

the Provincial Government asking for proceedings to be stayed pending the decision of their memorial. Various other reasons were given in this application against the acquisition of the land for the purpose of the market It was also stated that the market value of the land was not less than Rs. 1,000 per bigha kham The Collector held proceedings and made an award under section 12 of the Act. Under sub-section (2) of section 12 he gave notice of his award to the appellants. Under section 18 it was open to the appellants by written application to the Collector to require that the matter of the award should be referred for the determination of the District Judge. The applicant was bound to state also the grounds on which the objection to the award was taken. The appellants submitted, on the 4th and 12th respectively of July, applications, which the Collector treated as applications made under section 18 of the Act requiring the matter of the award to be referred to the District Judge. The District Judge has held that these applications, though acted upon by the Collector, did not comply with the law, and consequently that he had no jurisdiction to entertain the reference. Neither of the applications contained any request that the matter of the award should be referred for the determination of the District Judge. They asked that the matter relating to compensation should be postponed until the final decision as to the propriety or legality of Government in acquiring the land for the *mandi* has been settled by a competent court They also mentioned that the amount of compensation awarded by the Collector was low and was not accepted. It is clear that there is no suggestion in these applications of a reference to the District Judge for the purpose of determining the sufficiency of the award. The reference to the competent court would,

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when read with the former applications to the Collector objecting to the acquisition of the market, amount to an expression of intention by the appellants to bring a declaratory suit as regards the land, and such suit would be brought not in the court of the District Judge, but in the court of the Subordinate Judge. Again, it is required by section 18 (2) that the person asking the Collector to refer an award to the District Judge shall state the grounds on which objection is taken to the award. The ground stated here is that the estimate is very small. Possibly this might have been a compliance with the law as an expression of the ground of objection to the award, but it is immediately followed by a paragraph asking that the matter relating to compensation might be postponed until the decision of the declaratory suit threatened in the earlier application and in the former paragraph. We, therefore, agree with the District Judge that these applications did not comply with the provisions of section 18 of the Act.

It has been urged that any defect in the applications was cured by the Collector acting upon them and making a reference to the District Judge. On this point we may refer to the case of *In the matter of Government* v. *Nanu Kothare* (1). It is there stated that the Collector in making a reference is only an agent of Government and that he is not entitled to waive the requirements of the law on behalf of Government. Authority for this is found in the case of *Ezra* v. *Secretary of State for India* (2) decided by the Privy Council. We concur that the act of the Collector in acting on the applications will not preclude the District Judge from holding that they were not in compliance with law. The other pleas taken in the petition of the appeal have not been pressed.

(1) (1905) I.L.R., 30 Bom., 275 (2) (1905) I.L.R., 32 Calc., 605.

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Counsel for the appellants has asked permission in this Court to amend the application for reference by the Collector to the District Judge at this late date. This request is one which for obvious reasons it is impossible for this Court to grant. Both these appeals are, therefore, dismissed with costs.

Appeals dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Sulaiman.

EMPEROR *v.* BANWARI LAL.*

1926 *July*, 12.

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), section* 147—*Citation—Act No XLV. of* 1860 *(Indian Penal Code), section* 174.

Held, that a defaulter to whom a citation has been issued under section 147 of the United Provinces Land Revenue Act, 1901, does not render himself liable to prosecution under section 174 of the Indian Penal Code if he fails to appear in obedience thereto. *Emperor* v. *Bhirgu Singh* (1), followed. *Ram Bali Singh* v. *King-Emperor* (2), referred to.

THIS was a reference from the Sessions Judge of Mainpuri. The facts of the case were as follows:—The Government revenue due from one Banwari Lal was in arrears. A citation to the defaulter to appear on the 2nd of January, 1926, in case the arrears of Government revenue were not paid soon, was issued by the Tahsildar under section 147 of the United Provinces Land Revenue Act. Banwari Lal neither paid the revenue nor appeared on the date fixed. He was in consequence prosecuted and convicted by a first class Magistrate under section 174 of the Indian Penal Code and sentenced to pay a fine of Rs. 10 and in default to undergo ten days' simple imprisonment. Against this order Banwari Lal

* Criminal Reference No. 403 of 1926

(1) (1925) I L R., 49 All., 205 (2) (1910) 13 Oudh Cases, 55.

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applied in revision to the Sessions Judge who referred the case to the High Court, being of opinion that the non-attendance before the Tahsildar after service of the citation did not make the applicant liable for criminal prosecution under section 174 of the Indian Penal Code. The parties were not represented in the High Court.

The judgement of the Court (SULAIMAN, J.), after stating the facts as above, thus continued :—

Section 146 of the United Provinces Land Revenue Act provides for the recovery of an arrear of revenue by serving on the defaulter a writ of demand or citation to appear. Section 147 of the Act authorizes the issue of a writ of demand or a citation to appear when an arrear of revenue becomes due. Section 174 of the Indian Penal Code makes the intentional omission to attend in obedience to a summons, notice, order or proclamation, proceeding from any public servant legally competent to issue the same, a punishable offence. The question is whether the citation to appear does not come within the expression "summons, notice, order or proclamation." If the matter were entirely *res integra* I would have been inclined to hold that the citation was at any rate a notice, if not a summons or order, and that, therefore, its disobedience was covered by section 174 of the Indian Penal Code. I might have sought support from the case of *Ram Bali Singh* v. *King-Emperor* (1), if the matter were not concluded by a recent pronouncement of a Division Bench in *Emperor* v *Bhirgu Singh* (2), which is binding on me as a single Judge.

The difficulty is created by the use of the word 'citation" in sections 146 and 147 in distinct

(1) (1910) 13 Oudh Cases, 55 (2) (1926) I.L.R., 49 All., 205.

contrast with the use of the words "summons, notice and proclamation" in chapter IX of the Act The Bench thought that the form framed by the Board of Revenue embodies both the writ of demand and the citation in one document. The form before me, however, does not appear to be strictly a writ of demand. It merely says that if the arrears of revenue mentioned therein are not paid soon, then the defaulter should appear on the date fixed. There is no time specifically stated within which the revenue is to be paid, as is required by section 147. But undoubtedly the way in which the form has been prepared gives to the defaulter the option of either paying the arrears or appearing. It is not an unconditional notice or order to appear without fail. The form is called "summons to appear," but that, of course, would not make it a summons, if a citation is not a summons. The learned Judges laid stress on the fact that in the North-Western Provinces Act No. XIX of 1873, section 151, there was only a provision for the writ of demand and there was no power to issue either a citation or a summons; and in the Oudh Act (No. XVII of 1876), section 114, there was a provision for a writ of demand or a summons to appear, but the word "citation" was not used; whereas in the present Act in which both the previous Acts are combined there is a provision for a writ of demand or a citation. After coming to the conclusion that the word "citation" has been introduced advisedly, and giving to it its ordinary meaning, they held that it was rather in the nature of an invitation to appear than of an order to attend and that its meaning was analogous to the meaning of that word in the Probate and Administration Act (No. V of 1881), section 69, and Succession Act, sections 199 and 250. They concluded that a suitable meaning

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could be properly given to the word "citation" without attributing to it the full force of a summons. In this view the learned Judges were strengthened by the use of the word "summons" and not "citation" in section 193 of the Act. They accordingly held that the issue of a citation to an alleged defaulter under section 147 of the United Provinces Land Revenue Act does not involve him in any legal liability to attend and that no offence under section 174 is committed by non-appearance.

The view taken by the Bench certainly prevents the abuse of the power to issue a citation to appear and then to arrest the defaulter, which may be an intolerable hardship. A citation may be issued to the defaulter to appear. If the defaulter does not appear he is prosecuted for non-appearance and convicted. If he does appear but is not in a position to pay the entire arrears at once, he may be arrested and detained. The result is that if the defaulter is not in a position to pay the arrears immediately, he is given the option of not appearing and being convicted and sentenced or of appearing and being arrested and detained. It may be doubtful whether such a procedure was contemplated by the Legislature when the Act was passed.

However that may be, I am bound by the ruling in the above mentioned case, which must be deemed to be authoritative as the Government chose to appeal on a question of principle, and their appeal was dismissed.

I accordingly accept this reference, and, setting aside the order of conviction and sentence, acquit the accused of the offence with which he is charged and direct that the fine, if paid, be refunded.

Reference accepted.
Conviction quashed.

APPELLATE CIVIL.

1926
July, 13.

Before Mr Justice Sulaiman and Mr Justice Banerji.

ABDUL AZIZ (PLAINTIFF) *v* MARIAM BIBI AND ANOTHER (DEFENDANTS).*

Pre-emption—Suit to recover property based partly on a claim as owner and partly on an alleged right of pre-emption—Admission by party to suit—Effect of.

It is not a valid objection to a suit for recovery of possession of immovable property that the claim is based partly on a right of pre-emption and partly on the allegation that some of the property in suit was the plaintiff's own property which had been wrongfully sold by the defendant vendor *Sabodra Bibi* v. *Bageshwari Singh* (1), *Bhagwati Saran Man Tewari* v *Parmeshar Das* (2), applied; *Iqbal Haidar Khan* v *Musammat Wasi Fatma Bibi* (3), distinguished

An admission made by a party in the course of a suit is conclusive as against that party for the purposes of that suit

THE facts of this case were as follows:—

The suit was for recovery of possession of part of certain property the subject of a sale and for pre-emption of the rest The vendor was Musammat Maryam Bibi, the widow of one Ali Raza. The property sold admittedly belonged originally to Ali Raza The plaintiff claimed to be an "asba" (a residuary) of Ali Raza and entitled to a three-fourths share in his estate. The widow, however, transferred the entire property. Hence this suit. The court of first instance decreed the claim On appeal the District Judge modified the decree by cancelling the order for possession of three-fourths of the property by right of inheritance and allowing pre-emption of the whole

* Second Appeal No 405 of 1925, from a decree of H E Holme, District Judge of Cawnpore, dated the 15th of December, 1924 modifying a decree of Gauri Shankar Tewari, Subordinate Judge of Cawnpore, dated the 13th of May, 1924

(1) (1915) I L R., 37 All., 529. (2) (1914) I L R, 36 All., 67.
(3) (1922) I L R, 45 All., 58.

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ABDUL AZIZ v. MARIAM BIBI

The plaintiff appealed to the High Court.

Mr. *Syed Muhammad Husain*, for the appellant.

Maulvi *Iqbal Ahmad* (for whom Maulvi *Mukhtar Ahmad*), for the respondents.

The judgement of the Court (SULAIMAN and BANERJI, JJ.), after stating the facts as above, thus continued :—

On the 31st of March, 1924, the vendee Akbar Ali was examined by the court under order X, rule 1. He made a clear statement that the plaintiff was the uncle of the deceased husband of Musammat Maryam Bibi and was removed by four degrees, and that after Ali Raza's death he began to make collections for a year, and it was in consequence of her not being able to get profits that she transferred the property to him. This was undoubtedly an admission of the plaintiff's allegation that he was a relation within four degrees of the deceased Ali Raza. This admission ought to have been taken as conclusive. In spite of it the learned Subordinate Judge, owing to some oversight or perhaps misapprehension, did frame an issue on the question of relationship. But when he came to write out his judgement he referred to this admission and treated it as an admission of Akbar Ali in the suit. Independently of it, he relied on the statement on oath of the plaintiff and other oral evidence as well as a pedigree filed by the plaintiff, and held that the relationship was established. On appeal the learned District Judge has come to the conclusion that this admission was made by Akbar Ali in an unguarded moment and was apparently a mistaken admission because Akbar Ali could not have any satisfactory knowledge of his own on the point. Both these conclusions are startling. The learned Judge has thought that the admission was governed by section 31 of the Indian Evidence Act, which did not

make admissions absolutely conclusive. He has entirely ignored the fact that this was not an admission made on a previous occasion which was sought to be produced as an admission in a case to which section 31 would have applied. It was actually an admission of fact made in a suit and ought to have been treated as conclusive for the purposes of that suit. It is also difficult to understand why the learned Judge thought that Akbar Ali may not have knowledge of this pedigree. Ignoring this important admission the learned Judge has thought that the evidence of the plaintiff is not strong. We are of opinion that the finding of the learned Judge has been vitiated by the circumstances referred to above. It must, therefore, be assumed that the plaintiff is related to Ali Raza, as mentioned by him.

It has been urged on behalf of the respondent that the plaintiff's claim is barred by section 41 of the Transfer of Property Act because the vendee has purchased this property from an ostensible owner. But Akbar Ali has himself admitted that the plaintiff began to make collections of the profits soon after Ali Raza's death and that his widow sold this property to Akbar Ali because she was not able to get the profits. It cannot, therefore, be suggested that she was put in possession of the estate with the consent of the plaintiff. Section 41, therefore, would have no application.

The learned vakil for the respondent has further urged that, inasmuch as the plaintiff claimed possession of part of the property in his own right, he was really trying to put the vendor to proof of his title. His argument is that on the strength of the rulings in the case of *Sahodra Bibi* v. *Bageshwari Singh* (1) and in the case of *Iqbal Haidar Khan* v. *Musammat Wasi Fatima Bibi* (2), the suit was not maintainable.

(1) (1916) I.L.R., 37 All., 529. (2) (1922) I.L.R., 45 All., 53.

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In both those cases the plaintiff was not setting up his own right but was merely denying the title of the vendor Such a position cannot, of course, be taken up by a pre-emptor, because if a vendee has chosen to take the property with all the risks of getting a doubtful title the pre-emptor must offer to be substituted completely in his place. The case, however, is different when the plaintiff's own property has been wrongly sold by the vendor. In such a case there can be no estoppel against the plaintiff which would prevent him from claiming possession of his property In fact that is the only proper course open to him. If he were called upon to pre-empt his own property he cannot subsequently bring a suit for recovery of any consideration from the vendor. The causes of action for claiming possession of his own property and for claiming pre-emption of the vendor's property are separate and distinct, and there is no ground for not allowing the plaintiff to combine the two in one and the same suit. In *Sahodra Bibi's case* the Bench made it clear that they did not decide that a vendor was entitled fraudulently to insert property to which he had no title. In the case of *Bhagwati Saran Man Tiwari* v *Parmeshar Das* (1), the same Bench held that there was no defect in the frame of the suit if the plaintiff claimed the property as full owner and in the alternative for pre-emption. There, too, the plaintiff was trying to question the title of the vendor in the first instance, and he was not prevented from doing so. On principle we can see no distinction if the plaintiff is allowed to claim a part of the property as owner, and the remaining portion by pre-emption. Once this principle is conceded, the logical result is that he should get his own property without payment of any

(1) (1914) I L.R., 36 All., 476.

consideration, and the rest of the property on payment of a proportionate amount of the sale consideration, the presumption being that the consideration is spread over the entire property. There would be no point in decreeing his claim for part of the property as owner, if he is to be compelled to pay the whole consideration. Such a course would be inequitable and unjust.

The courts below have found that Rs. 3,500 entered in the sale-deed is also the true market price of the entire property including the plaintiff's share and that it represents the consideration for the whole. It is unnecessary to consider, what the first court suspected, viz , whether a proportionate part of the consideration was fictitious because the plaintiff's share which could not be validly transferred had been included The plaintiff's claim for possession of his own share and for pre-emption of the rest on payment of a proportionate amount must be decreed.

We accordingly allow this appeal and set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts We extend the time for payment by one month from this date

Appeal allowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr Justice King.

1923 July, 1

MAHMUD HASAN AND OTHERS (DEFENDANTS) *v.* LAUTE RAM (PLAINTIFF) AND HABIB-UR-RAHMAN AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, order XLI, rule 33—Usufructuary mortgage—Suit for declaration of payment—Finding of payment, but suit for declaration time-barred—Decree to be granted—Power of Court to give relief to party who has not appealed.

Plaintiff sued for a declaration that the money due in respect of certain property usufructuarily mortgaged by him had been paid off, and his suit was dismissed. He did not appeal, but some of the defendants did; and on this appeal it was found that the plaintiff's allegation of payment was correct, but that the remedy by means of a declaration was time-barred. The Court then took action under order XXXIV, rule 9 of the Code of Civil Procedure, and directed the defendants to re-transfer the property in suit to the mortgagor plaintiff.

Held, with reference to *Rangam Lal* v. *Jhandu* (1), that the procedure adopted by the lower appellate court was right

THE facts of the case were as follows :—

On the 28th of May, 1897, five properties were usufructuarily mortgaged by means of two deeds in favour of two ladies, Aminat-un-nissa and Ghafur-un-nissa. The money agreed to be advanced by the first-named lady was Rs. 27,500, and by the second Rs. 1,500. Under the former deed Rs. 21,200 were left with the mortgagee for paying off earlier mortgages and a promissory note was given by the mortgagee for the balance, Rs. 6,300; under the second deed Rs. 1,000 were left for satisfaction of earlier mortgages and Rs. 500 were paid in cash. None of

* Second Appeal No 325 of 1924, from a decree of M. F. P. Herbert, Esquire, District Judge of Saharanpur, dated the 16th of May, 1923, modifying a decree of Maulvi Muhammad Shafi, Subordinate Judge, dated the 15th of July, 1920

(1) (1911) I.L.R., 34 All., 32

the amounts left with the mortgagees for paying off the prior mortgages was ever paid by them

The plaintiff asked for a declaration that the property Ibrahimpur was not subject to any charge created under the mortgage-deeds, and there was an alternative prayer that if there was any charge it was limited to Rs. 987-1-9; and there was a prayer, in its nature formal, that any other relief which, under the circumstances of the case, could be granted to the plaintiff might also be granted to him.

The matter was tried in the court of the Subordinate Judge of Saharanpur, and he came to the conclusion that only Rs. 500 had ever been paid by the mortgagees, and that this sum had been more than satisfied from the usufruct. But owing to certain *lacunae* in the evidence the court held that no redemption decree could be granted, but it found in favour of the plaintiff that the particular property had been freed from any charge upon it.

The plaintiff did not appeal, but the defendant did, and when the matter came before the District Judge of Saharanpur, he found that the items of Rs 6,300 and Rs. 500, totalling Rs. 6,800, had been paid by the mortgagees. He went on to consider whether the mortgage as regards this particular property had been redeemed, and he came to the conclusion on taking the accounts that the mortgagees had been paid back the loan of Rs. 6,800 and that nothing was due to the mortgagees. Having reached that point he had to consider what should be done and he decided that the suit for declaration was barred by limitation The case, therefore, was in this position that the plaintiff having asked for a declaration, which the lower appellate court found was barred by limitation, and it having been found

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in his favour that there was no encumbrance on the property, the question arose as to what, in the circumstances, was the proper thing to do.

Before the District Judge gave any decision the case stood in this way that the plaintiff had succeeded partially in the lower court; he had not raised any cross-objection nor had he appealed independently on the matter decided adversely to him, namely, redemption The learned District Judge was of opinion that he could proceed under order XXXIV, rule 9, and that he could direct the defendants to re-transfer to the plaintiff that part of the mortgaged property which was the subject of the action. Some of the defendants appealed.

Maulvi *Iqbal Ahmad*, for the appellants

Mr. *Nihal Chand* and Dr. *Surendra Nath Sen*, for the respondents.

The judgement of the Court (MEARS, C. J., and KING, J), after setting forth the facts as above, thus continued :—

Looked at from any practical point of view the decision is as good as can be conceived, because the plaintiff had right upon his side from the outset. There had been a breach of contract in 1897 when the mortgagees got possession of the mortgaged property on a promise by them that they would pay the Rs 21,200 to which we have referred above It is common ground that they never made any attempt to pay any part of that, nevertheless they remained in possession of the whole of the property throughout. The effect of the possession was that by the date of the institution of this suit the Rs. 6,800 which had been advanced on promissory note had been completely extinguished and the plaintiff was asking in those circumstances that the property should be re-transferred to him. It is said that that cannot be done

because, having regard to the language of order XLI, rule 33, and the caution as to the application of that section which is contained in the case of *Rangam Lal* v. *Jhandu* (1), we must not in this case allow the relief which the District Judge has granted the plaintiff, because if we did so we would be acting in contravention of the provisions of order XLI, rule 22. There are, however, passages in that judgement which show that the circumstances of each particular case must be borne in mind, and at page 35 the following observations are to be found :—

"The object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection Of such cases the illustration to the rule is a type"

Reference was made to the English case of *The Attorney-General v Simpson* (2) In our opinion the language of order XLI, rule 33, is wide enough to support the decision of the District Judge. He very wisely chose what, in our opinion, was the proper course. He could, had he been extremely technical, have said that as the respondent had filed no cross-objection and had not independently appealed, that, therefore, he could not grant the relief to which, in his opinion, the respondent was most justly entitled. Had he done that it is possible that on a strict construction of order XLI, rule 33, we might have upheld that, but we should have held that grudgingly and taken the view that it was an unfortunate decision This decision is in consonance with justice, equity and good conscience, and it is in

(1) (1911) I.L.R., 34 All., 32. (2) (1901) 2 Ch D., 671

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our opinion one which must be upheld. We, therefore, dismiss this appeal with costs.

The cross-objection is also dismissed

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr Justice Daniels.

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July, 12.

EMPEROR *v* RAM DEO SINGH AND ANOTHER*

Criminal Procedure Code, sections 107 and 112—Security for keeping the peace—Substance of information given in summons itself, instead of in order—Irregularity.

A Magistrate taking proceedings under section 107 *et seq.* of the Code of Criminal Procedure, instead of sending a copy of his order with the summons, gave the substance of the information in the summons itself. *Held*, that the Magistrate failed to comply with the provisions of section 112, but the irregularity was covered by section 537 of the Code of Criminal Procedure as it was not shown that the accused had been prejudiced by it. *Emperor* v. *Sulaman Adam* (1) referred to.

Persons who come to the High Court in revision against an order under section 107 of the Code of Criminal Procedure are expected to do so with the utmost promptitude and certainly within thirty days of the order against which they complain

THIS was an application in revision against an order of the second Assistant Sessions Judge of Gorakhpur The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

* Criminal Revision No 299 of 1926, from an order of P. K. Ray, Second Additional Sessions Judge of Gorakhpur, dated the 8th of February, 1926

(1) (1909) 11 Bom., L.R., 740

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Mr. *S. C. Goyle*, for the applicants.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

DANIELS, J. :—This is an application in revision against an order binding over the applicants to keep the peace under section 107 of the Code of Criminal Procedure. The order is assailed on two grounds :—

(1) That it was passed by a Magistrate who had no jurisdiction.

(2) That no proper order under section 112 was prepared; nor was a copy of such order sent with the summons.

Section 107 requires that, unless the proceedings are started by the District Magistrate, both the person informed against and the place where the breach of the peace is apprehended shall be within the Magistrate's local jurisdiction. The place where the breach of the peace was apprehended was within the Magistrate's jurisdiction, but the applicant resided outside it No question of jurisdiction was raised in the trial court. It was raised before the Sessions Judge, who held that as the applicants had a *chhaoni* in the village, to which the dispute relates, and sometimes resided there, this temporary residence was sufficient to give the Magistrate jurisdiction. The question is whether the applicants were within the jurisdiction at the time when the proceedings were started. As to this there is no sufficient information on the record, but I do not propose to pursue the question further as the irregularity, if there was one, is cured by section 537 of the Code of Criminal Procedure.

As to the second objection, the Magistrate certainly failed to comply with the provisions of section 112. He ought to have embodied the substance of the information in the order which he passed. Instead

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of that he wrote the order on the back of a police report which gave the full details of the information, and apparently considered this sufficient. Instead of sending a copy of his order with the summons he gave the substance of the information in the summons itself. The applicants were, therefore, informed of what they had to meet. A similar irregularity has been held by the Bombay High Court in *Emperor* v. *Suleman Adam* (1) to be covered by the provisions of section 537 of the Code of Criminal Procedure.

It is not shown that the accused have been prejudiced, and I am the more unwilling to interfere in this case as the application is a very belated one. The order binding the applicants over was passed in December last. The appeal was rejected on the 8th of February, whereas the application to this Court was not presented till the 10th of May. Persons who come to this Court in revision against an order under section 107 are expected to do so with the utmost promptitude and certainly within thirty days of the order against which they complain.

For the reasons already given I dismiss the application.

Application dismissed.

Before Mr Justice Pullan

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July, 12

PIARI LAL *v.* SAGAR MAL.

Criminal Procedure Code, sections 435, 436 *and* 476—*Order of discharge by Magistrate—Competence of Sessions Judge to revise order at the instance of a private person.*

Held, that a Sessions Judge is empowered under section 435 of the Code of Criminal Procedure to call for the record of an order of discharge passed by a Magistrate in a case instituted under section 476, and, if he is dissatisfied with the correctness, legality or propriety of the finding, to order a further inquiry under section 436, and there is nothing

* Criminal Revision No. 362 of 1926, from an order of G. C. Badhwar, Sessions Judge of Aligarh, dated the 26th of April, 1926.

(1) (1909) 11 Bom. L. R., 740

to prevent a Sessions Judge from exercising this jurisdiction at the instance of a private person *Empress* v *Chotu* (1) referred to.

THIS was an application in revision from an order of the Sessions Judge of Aligarh The facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the order of the Court.

Munshi *Girdhari Lal Agarwala*, for the applicant

Babu *Sailanath Mukerji*, for the opposite party.

PULLAN, J. :—This application for revision is based on two main grounds :—

(1) It is argued that a Sessions Judge cannot take up at the instance of a private person any revision of a Magistrate's order of discharge in a case instituted under section 476 of the Code of Criminal Procedure.

(2) That a Sessions Judge cannot interfere with an order of discharge unless the order is manifestly foolish and perverse

I Prosecution in this case was ordered by a Munsif as the result of certain proceedings in his court under section 476 of the Code of Criminal Procedure Undoubtedly it is not the intention of the legislature that a private person should be encouraged to conduct prosecutions in cases of this kind, but no consideration of that nature applies to the present case. This prosecution has been duly started and the Magistrate has passed an order of discharge which appears to the Sessions Judge to be unwarranted by the evidence. The Sessions Judge is, therefore, empowered under section 435 of the Code of Criminal Procedure to call for the record and if he is dissatisfied

(1) Weekly Notes, 1886, p 231

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with the correctness, legality or propriety of the finding, to order a further inquiry under section 436. In every case somebody must bring the matter to the notice of the Sessions Judge, as it cannot be supposed that he is aware of all the orders of discharge passed by the Magistrates in his jurisdiction, and there is nothing in the Code to limit the persons who can bring the matter to the notice of the Sessions Judge. Thus it is immaterial how these facts were brought to the notice of the Sessions Judge in the present case and as he had ample powers to deal with the matter, there is nothing in the first ground of revision.

2. As to the second ground, this appears to be based on some decisions of the Lahore High Court which are not in conformity with those of the Allahabad High Court. The law was laid down by a Full Bench of the Allahabad High Court in the case of *Empress* v. *Chotu* (1). It has not been the practice of this High Court to restrict the powers of Sessions Judges any further than they are restricted by the Code of Criminal Procedure. In the present case it is sufficient to say that the Judge not only disagrees with the finding of the lower court and points out certain considerations which, in his opinion, should have led to a different finding, but he also states that one necessary witness was not examined I am certainly not prepared to allow this revision on the ground that that witness is now dead. I have only to consider whether the Sessions Judge passed a legal and reasonable order I am satisfied that he did so and that there is no ground for interference by this Court. I dismiss this application and order that the record be returned

Application dismissed.

(1) Weekly Notes, 1886, p. 281

APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr Justice King.

MADHO SINGH (PLAINTIFF) *v.* PANCHAM SINGH AND OTHERS (DEFENDANTS) *

1926 July, 13.

Mortgage—Suit by prior mortgagee—Decretal amount paid off by sale of one of the properties mortgaged—Subsequent suit on second mortgage—Purchaser held entitled to set up the first mortgage as a shield

S executed two mortgages, one on the 9th of May, 1904, in favour of *RS*, and the other on the 12th of May, 1915, in favour of *MS*. In 1916, *RS* brought a suit for sale on his mortgage, and impleaded therein the second mortgagee as well as the mortgagor The plaintiff obtained a decree, and the properties mortgaged were put up for sale. The mortgagor, however, by selling one of the mortgaged villages, paid off the decretal amount In the deed of sale it was expressly stated that the executants were paying off the first mortgage—that of 1904—and that the purchaser was to have the property free from all incumbrances.

Held, on suit by the second mortgagee on the mortgage of 1915, that the purchaser was entitled to set up the first mortgage as a shield against the second mortgagee's claim.

Dinobundhu Shaw Chowdhry v. *Jogmaya Dasi* (1), followed.

ONE Musammat Sahodra executed two mortgages, one in favour of Ranjit Singh, on the 9th of May, 1904, and the other in favour of Kunwar Madho Singh on the 12th of May, 1915 The present suit was based on the second mortgage. In it Madho Singh claimed recovery of Rs. 2,000 principal amount, and Rs 3,000 as interest by sale of three properties mortgaged to him. The defendants Nos. 2 to 4, representing one Ram Chandra, were made parties as subsequent transferees

* Second Appeal No 660 of 1924, from a decree of G C Badhwar, District Judge of Aligarh, dated the 15th of January, 1924, confirming a decree of Abdul Hasan, Subordinate Judge of Aligarh, dated the 14th of August, 1923.

(1) (1901) I L R, 29 Calc, 154

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The suit was contested by the defendants Nos. 2 to 4 alone, and they said that although, in form, they were subsequent transferees, practically they were prior mortgagees. Their defence was based on the following facts. Ranjit Singh brought a suit for sale on his mortgage of 1904 in 1916 and made Madho Singh a party to the suit. A decree for sale was obtained and the properties mortgaged were put to sale. One of the properties, viz., Nagla Chamaran, was sold for a sum of Rs. 20,000 on the 20th of February, 1919. Musammat Sahodra, however, did not allow the sale to be confirmed. She managed to raise some money and to pay off the decretal amount plus the penalty and the fees payable for the sale. This was on the 16th of March, 1919. She sold the village of Nagla Chamaran to Ram Chandra for a sum of Rs. 30,000. The contention of Ram Chandra's successors was that his money went to satisfy the earlier mortgage of 1904, and, therefore, to the extent that his money went to satisfy that mortgage, his successors were entitled to claim priority over the second mortgage held by Kunwar Madho Singh.

The suit was dismissed by the first court, and this decree was upheld in appeal. The plaintiff then appealed to the High Court.

Pandit *Gopi Nath Kunzru*, for the appellant.

Dr. *Kailas Nath Katju* and Babu *Sailanath Mukerji*, for the respondents.

The judgement of the Court (MUKERJI and KING, JJ.), after stating the facts as above, thus continued :—

The main question for determination in this appeal is whether the defendants Nos. 2 to 4 are entitled to priority due to the mortgage of 1904.

We have heard the learned argument addressed to us by the learned counsel for the appellant. We think that the courts below were right. The sale-deed relating to village Nagla Chamaran has been read to us. We find that the executants expressly say that they were paying off the first mortgage, that is to say, of 1904, and the vendees were to have the property free from all encumbrances. There can be no doubt that the intention of the parties to the sale-deed was that the first mortgage should be kept alive for the benefit of the vendees. The case of *Dinobundhu Shaw Chowdhry* v *Jogmaya Dasi* (1) is really conclusive on the point. In that case there were two prior mortgages and there was an attachment of the property subject to those mortgages. The mortgagor made a third mortgage, raised a sum of Rs. 40,000 and paid off the two prior mortgages. The purchaser at auction sale, which followed the attachment, contended that he had purchased the property free from the two prior mortgages and that the third mortgagee was not entitled to any priority due to the first two mortgages. It was held by their Lordships of the Privy Council that it must be assumed that the third mortgagee advanced the money to pay off the first two mortgages with the idea of keeping the benefit to himself and not to benefit the auction-purchaser by the transaction. The same principles apply to this case. It cannot be said that Ram Chandra advanced the money for the sole benefit of Madho Singh, viz., to enlarge his security, and not to keep for himself the priority which was due to the mortgage he was satisfying. The mere fact that Musammat Sahodra made a private sale to Ram Chandra does not, in any way, affect the principles on which the suit should be decided

(1) (1901) I.L.R., 29 Calc., 154.

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Similar argument applies to the mortgage of the same date and in favour of Ram Chandra. We are, therefore, of opinion that the courts below were right in giving priority to the descendants of Ram Chandra.

The result is that the appeal fails, and it is hereby dismissed with costs.

Appeal dismissed.

Before Mr Justice Mukerji and Mr. Justice King.

1926
July, 15

SHEO DAYAL, NIRANJAN LAL (PLAINTIFF) *v.* GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANT).*

Act No. IX of 1890 (*Indian Railways Act*), *sections 77 and* 80 *—Interpretation of Statute—Suit against a railway company for compensation for loss of goods—Notice—"Loss" —"Non-delivery."*

On the 26th of January, 1920, plaintiff's agent at Hapur handed over to the Oudh and Rohilkhand Railway certain bags of sugar and wheat for carriage to plaintiff at a place in the Banda district. The consignment did not reach plaintiff until the 29th of October, 1920, when it was discovered to be short by 17 bags. On the 13th of January, 1921, plaintiff gave notice to the Great Indian Peninsula Railway, who had carried the goods for the latter part of the journey, and sued the company for the value of the goods lost, and for the refund of an alleged overcharge that he had been made to pay. The suit was dismissed.

Held, on appeal, that the dismissal was right. Non-delivery includes "loss" as that term is used in section 77 of the Indian Railways Act, 1890, and notice of suit had not been given within time Nor could a claim for refund of the overcharge be made against the Great Indian Peninsula Railway Company in any case *East Indian Railway Company* v *Fazal Ilahi* (1) and *Assam Bengal Railway Co., Ltd.*, v *Radhika Mohan* (2), followed. *Badri Prasad* v. *Great Indian Peninsula Railway* (3), distinguished

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* Second Appeal No 860 of 1924, from a decree of K. G. Banerji, District Judge of Cawnpore, dated the 18th of February, 1924, confirming a decree of Zorawar Singh, Additional Subordinate Judge of Banda, dated the 9th of December, 1922

(1) (1924) I.L.R., 47 All., 186 (2) (1922) 72 Indian Cases, 714.
(3) (1924) 22 A.L.J., 897

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SHEO DAYAL, NIRANJAN LAL v. GREAT INDIAN PENINSULA RAILWAY COMPANY.

THIS was an appeal by the plaintiff in the original suit, who sought the recovery of the value of goods lost, the amount of a certain overcharge alleged to have been paid and damages against the respondent, the Great Indian Peninsula Railway Company

The facts were briefly as follows:—On the 26th of January, 1920, the plaintiffs' agent, who was impleaded as the defendant No. 2 and against whom no relief was claimed, despatched 58 bags of raw sugar, 32 bags of wheat and 11 bags of refined sugar to the plaintiffs in the district of Banda. The consignment was sent from Hapur. The goods did not reach their destination till the 29th of October, 1920 On this date it was discovered that the consignment was short by 17 bags made up of different kinds of commodities. The plaintiffs gave notice to the railway administration on the 13th of January, 1921, and instituted the suit on the 13th of August, 1921 The question was whether the notice was a good one

The suit was dismissed by the lower appellate court on the sole ground that no notice as required by section 77 of the Indian Railways Act was given by the plaintiffs

The plaintiffs appealed to the High Court

Munshi *Damodar Das*, for the appellant.

Pandit *Ladli Prasad Zutshi*, for the respondent.

The judgement of the Court (MUKERJI and KING, JJ.), after setting forth the facts as above, thus continued:—

Under section 77 of the Indian Railways Act a notice has to be given of a claim for compensation for the loss, destruction or deterioration of goods delivered to be carried, within six months from the date of the *delivery* of the goods *for carriage* by railway. The date when the goods were delivered for carriage was

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the 26th of January, 1920. Obviously, therefore, the notice was given beyond six months from this date On the face of it, the suit was properly dismissed on the ground of section 77 of the Indian Railways Act.

In this Court, however, it has been contended that section 77 has been wrongly interpreted. Correctly interpreted, it is urged, it should mean that notice has to be given within six months of the delivery. To read the section in that way would be doing clear violence to the plain language of the rule, and we are not prepared to accept this contention.

It was then contended that there was no " loss by the railway " and, therefore, the claim was merely for non-delivery of goods and no notice was required under section 77. But on the plaint itself the goods were lost, vide paragraph 7 of the plaint. The plaintiffs there say " In spite of giving a notice the defendant No. 1 did not pay the price of the articles which were destroyed (*zaya ho gae*) on account of its neglect, nor did it refund the freight which it charged unreasonably." Apart from this pleading of the plaintiffs, we are of opinion that the word " loss " in section 77 of the Indian Railways Act does include a case of non-delivery. We are aware that there is a case in this Court in which a contrary view was taken. But the facts of that case were entirely different. We need not say whether that case was rightly decided or not, but the case before us is clearly different. We refer to the case of *Badri Prasad* v. *Great Indian Peninsula Railway* (1) That was a case decided by a single Judge of this Court. On the other hand, there is another case, still more recently decided by another single Judge of this Court, in which it was held that the word " loss " did include non-delivery; see *East Indian Railway Company* v *Fazal Ilahi* (2).

(1) (1924) 22 A L J , 897. (2) (1924) I L R , 47 All., 786.

There are several cases in the books in which different views have been taken of the meaning of the word "loss," but the majority of the cases do establish that the word "loss" in section 77 includes "non-delivery" or loss to the plaintiff; see, for example, *Assam Bengal Railway Co., Ltd.* v *Radhika Mohan Nath* (1), a case decided by a bench of two Judges of the Calcutta High Court. In the Patna High Court there are two cases, each decided by a single Judge, and in them contrary views were taken.

In the view taken above, the plaintiffs' claim for compensation for loss of goods was rightly dismissed.

It has, however, been contended that, in any case, the amount of overcharge of freight should have been refunded. The learned appellate Judge has found that the overcharge was paid on the 29th of October, 1920, the date of the delivery of the goods to the plaintiffs, in the district of Banda It seems clear to us that it was physically impossible for the plaintiffs to give notice of this overcharge within six months of the date of the delivery of the goods for carriage by railway at Hapur. In the circumstances we are bound to hold and we do hold that for the maintenance of the claim for this overcharge a notice under section 77 of the Indian Railways Act was not necessary.

The plaintiffs, however, are confronted with another difficulty, and it is this. The goods were handed over to the Oudh and Rohilkhand Railway administration at Hapur. The contracting parties were that railway administration and the plaintiffs. The defendants carried the goods as the agents of the contracting party, the Oudh and Rohilkhand Railway administration. In the circumstances, the principal

(1) (1922) 72 Indian Cases, 714

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alone was liable and not the agent. The case is not covered by section 80 of the Indian Railways Act In this view the plaintiffs' suit could not be maintained for the refund of the overcharge against the Great Indian Peninsula Railway

The result is that the appeal fails and is hereby dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Pullan

1926
July, 27.

EMPEROR v. BHAIRON AND OTHERS *

Criminal Procedure Code, section 109, *clause* (a)—*Security for good behaviour*—"*Person taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction*"

It is an entire mistake to read clause (*a*) of section 109 of the Code of Criminal Procedure as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark, or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood The offence contemplated is that of a person, probably, though not necessarily, coming from outside the jurisdiction into the Magistrate's jurisdiction, for some nefarious purpose, and taking precautions to conceal the fact that he is present in that jurisdiction.

King-Emperor v. *Sharif Ahmad* (1), *Emperor* v. *Lalta* (2), and *Emperor* v. *Ghulam Jilani* (3), followed.

THIS was an application by the Local Government to revise an order of the Sessions Judge of

* Criminal Revision No 387 of 1926, by the Local Government, from an order of D C Hunter, Sessions Judge of Allahabad.

(1) (1911) 8 A L J , 1097 (2) (1919) 17 A.L.J., 891.
(3) (1918) 17 A L J , 432

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EMPEROR v. BHAIRO P.

Allahabad. The facts of the case, so far as they are material for the purposes of this report, appear from the judgement of the Court.

The Government Advocate (Mr. *G. W. Dillon*), for the Crown.

Munshi *Hanuman Prasad Agarwala*, for the opposite parties

WALSH, A. C J., and PULLAN, J —This is a Government revision from a decision of the Sessions Judge of Allahabad, reversing an order made by the Magistrate of Allahabad under section 109 of the Code of Criminal Procedure, directing the persons prosecuted to execute bonds with sureties to be of good behaviour At the hearing before the Magistrate there was a contest on the facts, but the question comes before us as a question of law and of the true interpretation of the section The facts are clearly established The three persons in question are *pasis* by caste, but are not registered members of a criminal tribe. They are residents of a neighbouring village to that in which the incident occurred They were found together in the dark, late in the evening, outside a house, where they were probably lurking with the intention of committing house trespass Matches and a house breaking implement, were found upon one of them When they were challenged by the police they ran away, and when they were caught they are alleged to have given false names Whether the latter is true or not is immaterial for our purposes, because the allegation by the police is sufficient to show that the police were not acquainted with their true names The Magistrate made the order complained of under the section, and summed up his findings by holding " that they were about to commit burglary and, when arrested, could not give a satisfactory account of themselves " That latter expression is one under sub-section (*b*) of section 109. That

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being the case, it is not surprising, and to our minds not a matter of criticism of the judgement of the learned Sessions Judge, that he should have overruled the Magistrate upon clause (*b*) and referred to authorities which bear upon that clause, and it is somewhat surprising that the Government should have chosen this case as an appropriate one for revision on the ground that the facts justified a conviction under clause (*a*), and complaining that the rulings relied upon by the Sessions Judge referred to clause (*b*) and not to clause (*a*). Applying to the Government the same rule that we apply to every litigant, we should be bound to hold that, inasmuch as the Sessions Judge had quashed the order of the Magistrate on the ground that it did not come within sub-clause (*b*), which was the only decision at which the Magistrate arrived, and that he had, therefore, acted strictly within his jurisdiction, there was no ground for interference in revision at all; but we are not content to dispose of the revision on that ground alone, because we recognize that the Government attach importance to the question and desire to get a ruling upon the interpretation of the section.

In our view the ruling of the Sessions Judge is right. It is a little difficult to deal with it concisely, inasmuch as the Sessions Judge, as we have said, concentrated upon the ground upon which the Magistrate had ordered the sureties to be given, and the Government complain that he did not direct his attention to the other sub-clause But as the application before us is based upon sub-clause (*a*), it seems better that we should express our opinion of that clause In our view it is an entire mistake to read that clause as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way

in which a criminal conceals his presence when he goes in the dark, or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood In our view the section does not contemplate such a situation and has no application to it, and was clearly drafted in contemplation of a totally different situation. Clause (*a*) says that the power is to be exercised in the case of "any person taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction." If it was intended to deal with anybody, either a habitual resident or a person well-known in the neighbourhood, trying to conceal himself, it would have been natural to employ the expression "conceal himself," and it is impossible to attribute to the expression "within the local limits of such Magistrate's jurisdiction" a direction as to the jurisdiction of the Magistrate over the offence, because for that purpose the words would be superfluous, the jurisdiction of the Magistrate for offences committed in his district being clearly established by other provisions of the law. It is an elementary principle of the interpretation of statutes that you must give a reasonable meaning to every expression. and we have, therefore, to interpret the passage "within the local limits of such Magistrate's jurisdiction" In our view it is part of the predicate "to conceal his presence," and the offence contemplated is that of a person, probably, although not necessarily, coming from outside the jurisdiction into the Magistrate's jurisdiction, for some nefarious purpose, and taking precautions to conceal the fact that he is present in that jurisdiction The words are free from ambiguity. Although the authorities to which we have been referred deal mainly with complaints under sub-clause (*b*), which was the clause with which the Judge was

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dealing, and although they were sufficient to justify the view which he took, in our view it is difficult to read the judgements delivered in each case by experienced Judges of long service in this country, without coming to the conclusion that if they had been driven to construe clause (*a*), they would have taken the view which we have expressed. We refer to the decision of Mr Justice CHAMIER in the case of *King-Emperor* v. *Sharif Ahmad* (1), and to the decision of Mr Justice PIGGOTT in the case of *Emperor* v. *Laltu* (2), a Judge who was very unlikely to go wrong in a matter of this kind, and who said in broad terms "I do not think it is possible to apply the provisions of section 109 of the Code of Criminal Procedure to the state of facts above set forth": that is to say, the conduct of a man endeavouring to conceal his identity and failing to give a satisfactory account of himself. The last case, although earlier in date, is that of *Emperor* v *Ghulam Jilani* (3) decided by Mr Justice TUDBALL, which contains the most valuable dictum of all. Mr Justice TUDBALL says: "The persons contemplated in the section are persons taking precautions to conceal their presence within the local limits of such Magistrate's jurisdiction, or persons who have no ostensible means of subsistence, and who cannot give a satisfactory account of themselves" Although the learned Judge was only quoting the *ipsissima verba* of the section, read in the context in which that quotation occurs, it appears to us that he dwelt upon the scope and ambit of the section in the sense which we are satisfied that it bears

The result is that this application must be dismissed The accused are on bail and their bail bonds must be discharged

Application dismissed.

(1) (1911) 8 A L J , 1097 (2) (1919) 17 A.L J., 891.
(3) (1918) 17 A L J., 452

Before Mr Justice Banerji.

HUSAIN *v* NOTIFIED AREA OF MAHOBA * 1926 July, 27.

Act (Local) No II of 1916 (United Provinces Municipalities Act), sections 337 and 314—Notified Area Committee—Authority for prosecution by—Daily fine

One Husain having disobeyed an order of a Notified Area Committee for the demolition of a certain building, the Committee passed a resolution that he should be prosecuted, and a copy of this resolution was sent by the President to the District Magistrate.

Held, that this was a sufficient authority for the prosecution within the meaning of section 314 of the United Provinces Municipalities Act, 1916

Held also, that in cases where an accused person may incur a daily fine for continued disobedience to an order, it is not competent to the court to fix the amount of such fine in advance *Emperor* v *Kashmir Lal* (1) and *Emperor* v. *Amir Hasan Khan* (2), followed.

THIS was an application in revision against an order passed by the District Magistrate of Hamirpur The facts of the case, so far as they are necessary for the purpose of this report, sufficiently appear from the judgement of the High Court

Mr *M A Rawat*, for the applicant

Munshi *D C Singh*, for the opposite party.

BANERJI, J. —This is an application in revision under the following circumstances —

Husain, the petitioner, was served with a notice on the 15th of December, 1925, that he should demolish within 24 hours certain constructions. I must say that the notice was a most unreasonable one, in that the petitioner was asked to demolish the house within 24 hours, but I have got nothing whatever to do with that all that I have got to see is whether Husain has been rightly convicted

* Criminal Revision No 394 of 1926, from an order of S S Nehra, District Magistrate of Hamirpur, dated the 17th of May, 1926

(1) (1921) I L R , 43 All , 644 (2) (1918) I L R , 40 All , 569

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It has been argued on behalf of Husain that the prosecution is incompetent, because no person has filed the complaint and has been examined as a prosecution witness, who had been authorized by the Notified Area of Mahoba under section 314 of the United Provinces Municipalities Act. In my opinion there is no force in this contention. I have examined the record, and I find that on the 2nd of February, 1926, the Notified Area of Mahoba did pass a resolution unanimously that the petitioner should be prosecuted for disobeying the notice which was served on him on the 15th of December, 1925. I have looked at the notice It is a notice signed by the President of the Notified Area, and, therefore, the petitioner can have no legitimate ground for complaint that the notice is not a legally proper notice. It appears that the Chairman of the Municipality sent a copy of the resolution of the Municipal Board to the Magistrate of the district, and thereupon the case against Husain was started I am of opinion that this is a substantial complaint within the provisions of section 314, in that that section requires "upon information received from the Board" a prosecution could be started The Municipal Board could not send information except through some officer, and I am of opinion that the President was the proper officer to inform the Magistrate of the resolution of the Board. I am, therefore, of opinion that the conviction of Husain is correct

After inflicting a fine on Husain, the learned Magistrate, who tried the case, went on to impose a daily fine of Re 1. This order offends against a number of rulings of this Court, see *Emperor* v. *Kashmiri Lal* (1) and *Emperor* v. *Amir Hasan Khan* (2). An application for revision was put in before

(1) (1922) I.L.R., 43 All., 644 (2) (1916) I.L.R., 40 All., 569.

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the learned District Magistrate and he has got behind these rulings by saying that this is really a second conviction. I have searched the record all over, and I find that this statement of the Magistrate is absolutely incorrect. I, therefore, set aside that part of the order of the Magistrate which imposes a daily fine. The application is otherwise dismissed.

MISCELLANEOUS CRIMINAL

Before Mr Justice Sulaiman and Mr. Justice Banerji.

EMPEROR *v.* RAM SARUP *

1926 September, 1

Criminal Procedure Code, section 561A—Bail—Inherent powers of High Court in the case of an applicant whose appeal is pending in the Privy Council.

A High Court has inherent jurisdiction to stay the execution of its own order when the ends of justice require it. It can, e.g., admit to bail a convicted person whose appeal has been admitted by the Privy Council

King-Emperor v. *Diwan Chand* (1) and *Queen-Empress* v. *Subrahmania Ayyar* (2), referred to

THE facts of this case are fully stated in the judgement of the Court

Pandit *Uma Shankar Bajpai*, for the applicant

The Government Advocate (Mr *G W Dillon*), for the Crown

SULAIMAN and BANERJI, JJ. :—Criminal miscellaneous applications Nos. 185 and 186 are connected and are applications for bail together with a prayer for stay of proceedings It appears that the two applicants appeared before Election Commissioners and gave evidence The Commissioners came to the conclusion that they were respectively guilty of forgery and perjury, and started proceedings under section 476 of the Code of Criminal Procedure The High Court in revision held that

* Criminal Miscellaneous No 185 of 1926

(1) (1926) P R, No 15 (2) (1900) I L R, 24 Mad, 161

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that court, not being a civil, revenue or criminal court, had no jurisdiction to proceed under section 476, but that there was nothing to prevent the Commissioners from filing a complaint Their report to the criminal court was treated as a complaint. The applicants were accordingly prosecuted, but acquitted by the trying Magistrate. On appeal by the Government to this Court, the Bench hearing the appeal came to the conclusion that the acquittal was improper and that the accused persons were guilty. The appeal was accordingly allowed and they were convicted and sentenced to nine months' rigorous imprisonment each There was a further order directing Ram Sarup, accused, respondent, to pay the costs of the Government

Before surrendering and before any appeal to their Lordships of the Privy Council was actually filed, the accused applied to this Court for bail on the ground that they had sent instructions to a Solicitor in England for lodging a petition for special leave The High Court naturally refused to entertain the application so long as the accused had not surrendered After information had been received that they had surrendered, the Bench dismissed the application, but "without prejudice to the right to bring another application in the event of special leave being granted by the Privy Council"

It now appears that a petition for special leave has been lodged, but owing to the vacation it has not yet come up before their Lordships and is not likely to be considered before October next. The accused have accordingly applied afresh for being released on bail

The first point which has been raised before us is as to whether we have jurisdiction to grant bail in a

case which has been disposed of by this Court and in which an appeal may be, or is, pending in the Privy Council The Punjab Chief Court in the case of *King-Emperor* v *Diwan Chand* (1) came to the conclusion that it had no power under section 478 of the Code to release a person on bail pending an appeal to the Privy Council Their attention was drawn to the case of *Queen-Empress* v *Subrahmania Ayyar* (2), but they distinguished that case on the supposition that the decision might have been based under the High Court's charter The last-mentioned case, however, shows that when the accused applied for bail to the Judicial Committee their Lordships expressed the opinion that the matter should be decided by the Madras High Court The Madras High Court clearly came to the conclusion that it had jurisdiction to make an order in that case. releasing the accused on bail pending the decision of the Privy Council. That case was decided when the old Code was in force and there was no express section under the Code as to inherent jurisdiction We are of opinion that a High Court has certainly inherent jurisdiction to stay the execution of its own order when the ends of justice require it In cases where an appeal has been admitted by their Lordships of the Privy Council and there is a fear that the sentence would expire before the appeal can be disposed of, it would be within the power of this Court to grant bail Such inherent power must be deemed to exist in the High Court In section 561A of the Code of Criminal Procedure, it is expressly provided that nothing in that Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent the abuse of the process of any Court *or otherwise to secure the ends*

(1) (1908) P R, No 15 (2) (1900) I L R, 24 Mad, 161.

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of justice. We are, therefore, clearly of opinion that we have jurisdiction to entertain this application and to grant bail

The question still remains whether it is proper to do so. We have already pointed out that the Bench when dismissing the former application remarked that if it should happen that special leave to appeal is given by the Privy Council, it would be open to the applicants to apply to this Court for bail. Nothing has happened since that date which has substantially altered the position. Even at that stage the High Court, in view of the prospective appeal, had jurisdiction to grant bail, but refused to do so, remarking that there would be a right to apply after the special leave had been granted. All that has happened is that a petition for special leave has been lodged, but no special leave has yet been granted.

We should like to add that the applicants have not filed before us any copy of their petition of appeal or of any affidavit that they might have sent, which would show to us that this case comes within the rule laid down by Viscount HALDANE in the case of *King-Emperor* v. *Dal Singh* (1). We, however, think that the realization of the costs directed to be paid by the accused Ram Sarup should be stayed, as no harm can accrue by the stay of those proceedings until October next. We accordingly decline to grant the application for bail at this stage, leaving it open to the applicants to apply again if the special leave is granted by the Privy Council, but we direct that the proceedings relating to the realization of the costs be stayed till the disposal of the petition for special leave

(1) (1917) I L R., 44 Calc., 876

APPELLATE CRIMINAL

Before Mr Justice Sulaiman and Mr Justice Banerji

EMPEROR *v* BIHARI *

1926 *September* 7.

Criminal Procedure Code, section 288—Evidence—Statements before Committing Magistrate now admissible "for all purposes."

Under section 288 of the new Code of Criminal Procedure, statements made before a Committing Magistrate, when admissible under the Indian Evidence Act, can be admitted "for all purposes" and not only for the purpose of corroboration or contradiction. The use of the expression "for all purposes" was clearly intended to remove the previous conflict of opinion and the words "subject to the provisions of the Indian Evidence Act, 1872," mean nothing more than that such statements should not contain matters which would be irrelevant or inadmissible under that Act. *Queen-Empress* v *Dan Sahai* (1), *Queen-Empress* v *Nirmal Dass* (2), *Emperor* v. *Dwarka Kurmi* (3) and *King-Emperor* v *Jehal Teli* (4), referred to.

THIS was a criminal appeal from a conviction under section 302 of the Indian Penal Code. The accused was charged with the offence of murdering his wife Musammat Gobardhani. For the last three years or so there had been an illegal intimacy between the accused's wife and a shopkeeper named Masna. The brothers of the accused disliked this, and when the intrigue was not stopped they separated their part of the house by means of a partition wall a few months before the occurrence. Some complaint had been filed by Masna's

* Criminal Appeal No. 507 of 1926, from an order of Kashi Prasad, Sessions Judge of Mutra, dated the 12th of July, 1926

(1) (1885) I L R , 7 All , 862
(2) (1900) I L R , 29 All , 445.
(3) (1906) I L R , 28 All , 683
(4) (1924) I L R , 3 Pat , 731

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father in a criminal court, and the 3rd of June, 1926, was fixed for its hearing. Masna came over and asked the accused to give evidence on behalf of his father. The accused declined to do so. His wife Musammat Gobardhani also tried to persuade him to give evidence, but he persisted in refusing to go to court Musammat Gobardhani, however, herself offered to give evidence on behalf of her paramour's father Musammat Gobardhani was murdered on the night preceding the 3rd of June, 1926. Her dead body was found in a well next morning. Bihari was then arrested and tried for the murder and convicted and sentenced to death by the Sessions Judge of Muttra He appealed

Pandit *K N Laghate*, for the appellant.

The Government Advocate (Mr *G. W. Dillon*), for the Crown.

The judgement of the Court (SULAIMAN and BANERJI, JJ), after discussing at length the evidence in the case, as regards the point of law raised on behalf of the accused, thus continued .—

We have overruled the point of law raised by the learned vakil for the accused that the statements of Roshan and Tiku made before the Committing Magistrate, though admitted by the Judge under section 288 of the Code of Criminal Procedure, cannot be used as substantive evidence and could only have been used for the purpose of corroboration or contradiction. Under the old Code there was some conflict of opinion In the earlier cases, namely, *Queen-Empress* v. *Dan Sahai* (1) and *Queen-Empress* v. *Nirmal Das* (2) it was suggested that such statements could not be used as substantive evidence. But in

(1) (1885) I L.R , 7 All , 862 (2) (1900) I L R , 22 All , 445.

the case of *Emperor* v. *Dwarka Kurmi* (1) a Bench of this Court held that statements made before a Committing Magistrate could be admitted as evidence. Since then the section has been amended and reads as follows :—

> ' The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes, subject to the provisions of the Indian Evidence Act, 1872 "

This, in our opinion, makes it quite clear that statements when admissible under the Indian Evidence Act can be admitted " for all purposes " and not only for the purpose of corroboration or contradiction The use of the expression " for all purposes " was clearly intended to remove the previous conflict The words " subject to the provisions of the Indian Evidence Act, 1872," mean nothing more than that such statements should not contain matters which would be irrelevant or inadmissible under that Act After expressing this opinion our attention was drawn to the case of *King-Emperor* v *Jehal Teli* (2) where this view has been accepted

We find, however, that the accused is a young man of about 22 years of age and his wife was openly immoral. He put up with her immorality for some time, but she proved too much for him and was bold enough to offer to go to court and give evidence on behalf of her paramour's father very much to the dislike of the accused. The accused must have resented it extremely and must have felt that he would be considerably disgraced by this act. It was in that moment of despair that he must have committed this murder.

(1) (1906) I L R , 28 All , 683 (2) (1924) I L R , 3 Pat , 781

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We, therefore, think that the ends of justice will be met by reducing the sentence to one of transportation for life. We accordingly uphold the conviction but reduce the sentence to one of transportation for life.

Conviction upheld.

REVISIONAL CRIMINAL.

Before Mr Justice Sulaiman.

1926
October, 2

PANCHANAN BANERJI *v* UPENDRA NATH BHATTACHARJI.*

Criminal Procedure Code, section 561A—"Inherent powers" of a High Court—Power to direct expungement of objectionable remarks from judgement of a subordinate court.

The inherent power of a High Court referred to in section 561A of the Code of Criminal Procedure must be deemed to include a power to order the deletion from the record of a subordinate court of passages which are either irrelevant or inadmissible and which adversely affect the character of persons before the court Such jurisdiction, however, can only be exercised when there is no foundation whatsoever for the remark objected to and not where it is a matter of inference from evidence.

Emperor v *Thomas Pellako* (1), *Ma Kya* v. *Kin Lat Gyi* (2), *Emperor* v *C Dunn* (3) and *Mohammad Qasam* v. *Anwar Khan* (4), referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Sailanath Mukerji*, for the applicant.

The Assistant Government Advocate (Dr *M. Wali-ullah*), for the Crown

* Criminal Revision No 303 of 1926, from an order of K A. H Sams, Sessions Judge of Benares, dated the 19th of January, 1926.

(1) (1911) 14 Indian Cases, 648
(2) (1911) 11 Indian Cases, 1000
(3) (1923) I L.R., 44 All, 461.
(4) (1926) A.I.R (Lahore), 382

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PANCHANAN BANERJI v. UPENDRA NATH BHATTACHARJI.

SULAIMAN, J. :—This is an application praying that the acquittal of the accused by the Sessions Judge should be set aside and that certain passages in the judgement, which are against the complainant's character, should be expunged.

Although the High Court has undoubtedly jurisdiction to set aside an order of acquittal, that power is exercised in rare and exceptional cases. In this case the learned Sessions Judge has come to the conclusion that the case was a very troublesome and difficult one, and that there was the evidence of one of the prosecution witnesses of a partnership between the accused and the complainant and as no report was made to the police, the Judge was not satisfied that the accused was bound by any contract to dispose of the articles entrusted to him as declared by the complainant. He is of opinion that the dispute is really a fit one for the civil courts. The inference drawn by the Judge from a number of letters and the oral evidence is an inference of fact and it is impossible to say that his conclusion is perverse or even wrong. I cannot, therefore, accede to the prayer for setting aside the acquittal.

As regards the question of expunction, the learned Government Advocate has urged before me that this Court has no jurisdiction to make any such order and cut out the portions from the judgement of the appellate court In the Code of Criminal Procedure such power is not conferred in express terms. The question is whether it is within the inherent jurisdiction of the High Court to make such an order. Under the old Code there was some conflict of opinion The Burma Chief Court had in two cases, *Emperor* v *Thomas Pellako* (1) and *Ma Kya* v *Kin Lat Gyi* (2) expressed the view that such jurisdiction existed

(1) (1911) 14 Indian Cases, 643 (2) (1911) 11 Indian Cases, 1000.

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PANCHANAN BANERJI v. UPENDRA NATH PRATTACHARJI

In *Emperor* v *Lachhu* (1) LINDSAY, J. C. sitting in the Oudh Judicial Commissioner's Court, distinctly held that he had such jurisdiction and ordered certain remarks in the judgements of the courts below against a counsel who had appeared in the case to be expunged from the record. On the other hand, GOKUL PRASAD and STUART, JJ., in the case of *Emperor* v. *C Dunn* (2), held that the High Court had power to make an amendment of an effective order of the court below, and not that of expunging passages which do not commend themselves to it At the end of the judgement they, however, remarked —

"If it be held that the grievances of persons, who are unjustly criticized by courts of law in circumstances which obviate the effective orders of the courts coming before Superior Courts in appeal or revision, are so great as to require a special enactment for their protection, the matter is one for the consideration of the Legislature, but as the law stands, we are satisfied that we have no authority"

In the new Code, section 561A has been added and it says :—

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice"

Had it been permissible to refer to the statement of the objects and reasons, the intention of the Legislature would have been at once clear. Courts, however, cannot take into account the view of a select committee But the section emphasizes the wide inherent power which a High Court possesses to "prevent abuse of the process of any court or otherwise to secure the ends of justice." I see no reason why such an inherent power should not comprise a power to order a deletion of passages which are either irrelevant or inadmissible and which adversely affect

(1) (1914) 24 Indian Cases, 156 (2) (1922) I L R, 44 All., 401

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the character of persons before the court The High Court as the Supreme Court of revision must be deemed to have power to see that courts below do not unjustly and without any lawful excuse take away the character of a party or of a witness or of a counsel before it. SHADI LAL, C J., in the case of *Mohammad Qasam* v. *Anwar Khan* (1) recognized that under section 561A there is an inherent power of the High Court to delete objectionable remarks against witnesses or accused persons Such jurisdiction, however, can only be exercised when there is no foundation whatsoever for the remark objected to and not where it is a matter of inference from evidence

[Here His Lordship referred to the passage in the judgement which was sought to be expunged and held that there was no evidence to justify the language employed in the judgement]

I accordingly order that the words which are objected to should be expunged from the judgement of the Sessions Judge The other prayer asked for in the application is not granted.

APPELLATE CIVIL

Before Mr Justice Dalal and Mr Justice Pullan

THE PUNJAB NATIONAL BANK (PLAINTIFF) *v* TAJAMMUL HUSAIN, BISHESHAR NATH AND OTHERS (DEFENDANTS) * 1926 *October*, 19.

Act No XXVI of 1881 *(Negotiable Instruments Act), sections 27 and 82—Hundi—Renewal of hundi after acceptance—Liability of acceptor on first bill*

On the 2nd of November, 1921, two hundis were drawn by Tajammul Husain, Bisheshar Nath, in favour of the Punjab National Bank, the drawees being the firm of Moti Lal, Bisheshar Nath of Calcutta, by which they were accepted

* First Appeal No 23 of 1924, from a decree of Syed Iftikhar Husain, First Subordinate Judge of Cawnpore, dated the 21st of September, 1923

(1) (1926) A I R (Lahore), 382

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On the 4th of February, 1922, these hundis were renewed by the same drawers, but were not accepted by the drawees.

Held, that this renewal did not absolve the drawees from their liability on the original hundis *Sheikh Akbar* v *Sheikh Khan* (1), *Sirdar Kuar* v *Chandrawati* (2), *Dargavarapu Surrapu* v *Rampratapu* (3) and *David Torrance* v *The Bank of British North America* (4), referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Mr. *Nihal Chand* and Munshi *Sarkar Bahadur Johri*, for the respondents.

DALAL and PULLAN, JJ :—The Punjab National Bank has appealed from the dismissal of its suit for money on foot of two hundis, dated the 2nd of November, 1921. The hundis were drawn by the firm of Tajammul Husain, Bisheshar Nath, and the drawee was the firm of Moti Lal, Bisheshar Nath at Calcutta. These hundis were duly accepted by the firm of Moti Lal, Bisheshar Nath. The question of acceptance has already been dealt with by us in our judgement in First Appeal No. 524 of 1923 delivered today. We hold acceptance to have been made by a person duly authorized by the firm as required by section 27 of the Negotiable Instruments Act. These hundis were renewed on the 4th of February, 1922, by the same drawer, but were not accepted by the firm of Moti Lal, Bisheshar Nath on presentation. The learned Judge of the lower court held that the renewal of the 4th of February, 1922, was a full discharge of the two prior hundis and that therefore the firm of Moti Lal, Bisheshar Nath was not liable to make payment either on the former two hundis of the 2nd of November,

(1) (1881) I L R., 7 Calc., 256
(2) (1882) I.L.R., 4 All., 330.
(3) (1901) I L R., 25 Mad., 580
(4) (1873) L.R., 5 App. Cas (P.C.), 245

1921, or on the subsequent hundis of the 4th of February, 1922.

The learned Judge relied on a ruling of this Court in the case of *Sirdar Kuar* v. *Chandrawati* (1). In our opinion the facts in that case were not similar to those of the present case. The principle applicable to a case like the present is one laid down in the case of *Sheikh Akbar* v. *Sheikh Khan* (2) :—

"When a cause of action for money is once complete in itself and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may always as a rule sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person"

There has been no such endorsement in the present case, and the principle of the above rule, which was followed by the Madras High Court in the case of *Dargavarapu Sarrapu* v. *Rampratapu* (3), would apply. If we refer to the relevant section of the Negotiable Instruments Act, the different ways in which the acceptor of a negotiable instrument may discharge his debt are given in section 82 The three ways are cancellation, release and payment. Admittedly there was no cancellation here, and there was no discharge because the new hundi was only a provisional discharge, which would have been complete if that hundi had been accepted. For the same reason there was no payment in due course In a case of the Judicial Committee—*David Torrance* v. *The Bank of British North America* (4), it was held under similar circumstances that a fresh agreement between the drawer and the holder for value of a bill of exchange did not release the acceptor of the first bill from liability on foot of the first bill. The learned

(1) (1882) I L R, 4 All, 330
(2) (1881) I L R, 7 Calc, 256.
(3) (1901) I L R, 25 Mad, 580
(4) (1873) L R, 5 App. Cas. (P.C.), 246.

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counsel for the respondents drew our attention to the observations on renewal of a bill of exchange in "Halsbury's Laws of England," Vol. II, page 553, where it is said —

"*Prima facie* the giving of a new instrument in place of an existing one has the effect not of discharging the instrument then existing, but of being a conditional satisfaction of it, so that if the new instrument is duly paid at maturity the first instrument is discharged; but if not, then the dormant rights on the first instrument are revived."

This is the rule enunciated in *Sheikh Akbar's* case. Then follows the sentence on which the learned counsel for the respondents has relied :—"Parties to the first instrument who do not assent to its renewal are in any case discharged." Possibly this covers the case of sureties and not of principal debtors such as an acceptor of a hundi is. It is also to be noticed that Bisheshar Nath, one of the partners of the firm, was a party as partner in another firm to the drawing of the new contract and was cognizant of the renewal.

The ruling from the Privy Council Law Reports quoted above does not favour the view that the acceptor of a bill of exchange is discharged from his liability on the renewal of that bill to which he has not consented.

We are of opinion that the Bank can enforce the liability of the firm of Moti Lal, Bisheshar Nath on foot of the two bills of exchange of the 2nd of November, 1921.

In the result we set aside the decree of the lower court and decree the plaintiff's suit on the two hundis of the 2nd of November, 1921, with costs in all courts.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Banerji.

EMPEROR *v.* MANTU TIWARI AND OTHERS *

1926 October, 29

Criminal Procedure Code, sections 263 and 264—Summary trial—Notes of evidence by Magistrate not necessarily part of the record

In cases in which sections 263 and 264 of the Code of Criminal Procedure are applicable, the Magistrate is perfectly free to take such notes as he pleases, or, if he prefers, to take none at all, and whether he takes them or whether he does not whatever notes he makes are his private property which he can treat exactly as he pleases *Satish Chandra Mitra* v. *Manmatha Nath Mitra* (1), dissented from

THIS was a reference to a Division Bench made by BOYS, J. in the following circumstances :—This reference by the learned Sessions Judge of Benares deals with a point of procedure which leads to constant discussion, and though in the particular case before me I have no doubt as to what the decision should be, it is desirable that the matter should be considered by two Judges, as the ruling of this Court will govern the conduct of every summary trial throughout the province for the future

The question is whether, if in a summary trial a Magistrate takes notes of the evidence, he is obliged to make those notes part of the record. Before referring the case I will make a few observations as the result of my consideration of it, to save the time of the Bench before whom the case may come. The learned Sessions Judge has asked that " a definite ruling might be made by the Hon'ble High Court as to whether it is necessary briefly to record evidence in appealable cases and whether, if rough notes be made

* Criminal Reference No. 428 of 1926.
(1) (1920) I L R., 48 Calc., 280.

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of the evidence, it is necessary that such notes should be kept and form part of the record." I note first that the learned Judge refers to "appealable cases." The case before him was not one of appeal but an application for revision The sentence was only Rs. 50, and though in addition to that there was an order for security, that order was passed under section 106 of the Code of Criminal Procedure and was not passed under section 118 and no appeal from that order would lie independently of the principal case. The question, therefore, as stated by the learned Judge does not actually arise I understand, however, that what in substance he requires is a ruling of this Court as to whether a Magistrate in a summary trial may record notes or must record notes, and whether, if in fact he does record notes, those notes must be made part of the record. He refers to *Satish Chandra Mitra* v *Manmatha Nath Mitra* (1), and two cases reported in Indian Cases in which the same view was taken It is hardly necessary to consider the two later cases Their Lordships of the Calcutta High Court held that the record of the evidence which the Magistrate had destroyed should have been kept with and formed part of the record. They were of opinion that section 263 only says that a Magistrate need not record the evidence, but that if he chooses to do so, the provisions of sections 355 and 356 come into play and that the record of the evidence must be made part of the record of the case That case is clearly distinguishable from the present. It is not suggested here that the Magistrate in the exercise of his discretion decided to "record the evidence." He did no more than take a few "notes." This decision, therefore, of the Calcutta High Court has no bearing on the present question, which is merely whether a

(1) (1920) I L R., 48 Calc., 280

Magistrate deciding not to record the evidence, but making a few notes of that evidence, must keep those notes on the record I have no doubt myself that he need not do so. It may be a question of some difficulty in a particular case whether a particular piece of paper on which are recorded facts stated by the witnesses amounts to a " record of evidence " or merely to notes, but there could rarely be serious difficulty. If a Magistrate means to " record evidence " he does so formally, more or less completely, and there can be no doubt about what the record was intended to be. On the other hand, if he jots down a few notes, possibly unintelligible to anybody but himself, merely for purposes of reference, there can be no doubt that such a document would not be a record of the evidence.

In regard to this latter type of notes it is, however, difficult to see how it could possibly be made part of the record, apart from the fact that such notes would be frequently unintelligible. The appellate court must decide the case on the record, and if it has to look at a record of evidence, that record of evidence must be one kept in accordance with the requirements of the Code of Criminal Procedure.

I further note that there is no reference throughout the whole of the Code of Criminal Procedure or the Evidence Act, so far as I am aware, to " notes " being taken of the evidence. It may be necessary to record evidence in full; it may be necessary to record a memorandum of the evidence, but there is no provision referring to " notes " as such.

It appears to me clear that when a Magistrate decides to try a case summarily he will first consider whether it is likely in the event of a conviction that an appealable sentence will be called for If he decides that a non-appealable sentence will probably be sufficient, he will proceed under section 263. In that case

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he not only need not record the evidence or a memorandum of the evidence, but he need not make any notes at all of the evidence and he need not even say in his judgement what the evidence was, except in so far as he must briefly state the reasons for his opinion If he decides that an appealable sentence is required or if, having decided that a non-appealable sentence will probably be sufficient, he subsequently has to change his mind, he must then embody in his judgement, in addition to the particulars required by section 263, "the substance of the evidence", in other words, the only difference between sections 263 and 264 is that in appealable cases the judgement must contain "the substance of the evidence" In neither case need there be any record of the evidence or any memorandum of the evidence I should, therefore, myself have no hesitation in holding that if a Magistrate for the purpose of assisting his own recollection jots down a few notes, those notes are nothing more than the notes taken by any Judge hearing an appeal for his own assistance, and need not and should not form part of the record. Section 264 is precise that the judgement shall be the only record. I should, therefore, have no hesitation myself in holding that any notes that do not amount to a record of the evidence in the sense in which that term is ordinarily understood (*cf.* sections 355 and 356) do not amount to a part of the record, need not be kept on the record and should not be kept on the record.

In view, however, of the universal application of the ruling that I would lay down to all summary trials throughout these provinces, I think it is desirable that the case should be laid with the above remarks before two Judges.

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Munshi *Kumuda Prasad* and Munshi *Gadadhar Prasad*, for the applicants.

The Government Advocate (Mr *G W Dillon*), for the Crown.

WALSH, A C J., and BANERJI, J —In our opinion Mr Justice Boys has taken the right view in this matter, and, so far as this High Court is concerned, we declare that the provisions of sections 263 and 264, in cases in which these sections are applicable, are not controlled by section 355, Code of Criminal Procedure. To attempt to apply them really introduces confusion and amounts to amending the Act. It seems to us that the matter is really quite clear, and has only been complicated by the decision in the case of *Satish Chandra Mitra* v *Manmatha Nath Mitra* (1), with which we are unable to agree Summary trials are dealt with in two different categories. Cases under section 263 are unappealable In such cases the Magistrate need not record the evidence, and he is only bound to enter the particulars mentioned in the section In section 264 he has to do a little more, namely, record a judgement embodying the substance of the evidence. There is nothing in that section compelling him to record the evidence. Some people have the gift of remembering, repeating and embodying in a judgement evidence which they have heard, without the assistance of any note recording such evidence Section 264 leaves a Magistrate, who thinks he is able to do that, perfectly free to do so if he likes, but if, on the other hand, like at any rate one member of this Bench, he finds it necessary to assist his recollection and his opinion by making, what you may call, notes or private memoranda or a temporary record of the evidence to aid him in coming to a satisfactory conclusion, such notes or memoranda

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form no part of the record of the case. They are only the vehicle which conveys to his mind the substance of the evidence which the section requires him to embody in the judgement The section clearly enacts that the judgement embodying the substance of the evidence which the Magistrate has heard shall be the only record, and in our view we could not order or declare that the Magistrate was bound to make something else part of the record, not mentioned in the section, without adding to or amending the section. It appears to us, with all respect to the learned Judges who decided the matter in Calcutta, that in order to arrive at the decision at which they did, it was necessary to jump over a very wide gulf It is true, as the judgement points out, that the primary rule is embodied in section 355, and that requires a Magistrate in cases to which that section is applicable, to make a memorandum of the substance of the evidence in the case. That is a compulsory memorandum. Section 355, sub-section (2) makes such memorandum, or, in other words, the compulsory memorandum a necessary part of the record. The fact that such compulsory memorandum does not apply to summary trials under either section 263 or section 264 seems to be conclusively established by the language of section 354. With great respect, it seems to us that the judgement of the Calcutta High Court treated the voluntary memorandum, or notes, or pieces of paper, whatever you like to call it, which the Magistrate chose to use to assist himself, either in an unappealable case under section 263, or in an appealable case under section 264 in which he had to embody the substance of the evidence in the judgement, as on the same footing and subject to the same statutory requirements as a compulsory memorandum which he was bound to take under section 355. In our view the statute does not justify

us in taking that view, and we hold that in cases in which sections 263 and 264 are applicable, the Magistrate is perfectly free to take such notes as he pleases, or, if he prefers, to take none at all, and whether he takes them or whether he does not, whatever notes he makes are his private property which he can treat exactly as he pleases.

As a matter of reasonable practice and common sense, which ought to solve most questions without the trouble of referring to a statute at all, it seems to us that if it turned out that a case is appealable and an appeal is eventually brought, and the Magistrate happens to have taken private notes, and when he is asked if he will lend them or provide them to the court of appeal for the purpose of hearing the appeal, and they are still in existence, there is no reason at all why he should not do so. That is a practice which one member of this Bench has invariably followed in the exercise of original civil jurisdiction in this Court when an appeal has been brought from his judgement. A Magistrate may supply copies to the parties or send the original to the court of appeal This is merely an act of convenience and courtesy A hard and fast rule issued by the District Magistrate that every Magistrate should destroy the notes seems, on the face of it, unnecessarily to hamper the discretion of his subordinate officers. It is often of great convenience when you are asked about something which happened in a case three months ago—it may have nothing to do with an appeal, it may relate to the conduct of some professional gentleman who was engaged in the case—to be able to refer to your own private notes, which you happen to have preserved You are thus able to refresh your recollection, just as a man of business is able to refresh his recollection as to what happened a long time ago from his books

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or diary, but we have no jurisdiction to dictate to the District Magistrate what he should do in this or any other matter, which is solely vested in his discretion, or to make any declaration about any order relating to such notes which he may have issued. The most we can do is to suggest, as we have done, a practical way of dealing with the matter.

We, therefore, reject the reference and direct the record to be returned to the Sessions Judge with the foregoing observations

Reference rejected and record returned.

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr. Justice Sulaiman

1926 October, 29

RAM KHELAWAN AND OTHERS (DEFENDANTS) *v.* BANKE BIHARI AND ANOTHER (PLAINTIFFS) AND RAM KALI (DEFENDANT).*

Act (Local) No XI of 1922 *(Agra Pre-emption Act), section* 19—*Pre-emption—Effect of acquisition of an interest in the mahal by the defendant vendee pending the suit.*

Under the Agra Pre-emption Act, 1922, the right of a plaintiff pre-emptor may be defeated by the acquisition by the defendant vendee at any time before decree, by means of gift, of an interest in the mahal in which the property in suit is situated *Qudrat-un-nissa Bibi* v. *Abdul Rashid* (1), followed

THE facts of this case sufficiently appear from the judgement of the Court

Munshi *Narain Prasad Ashthana*, for the appellants

The respondents were not represented.

LINDSAY and SULAIMAN, JJ :—This is a defendants' appeal arising out of a suit for pre-emption While the suit was pending the defendants obtained a share under a document purporting to be a deed of

* Second Appeal No 1099 of 1925, from a decree of Muhammad Shahabu-d-din, Second Additional Subordinate Judge of Allahabad, dated the 25th of March, 1925, reversing a decree of Brij Mohan Lal, Munsif of East Allahabad, dated the 18th of November, 1924

(1) (1926) I L R, 48 All, 616.

gift and on the strength of it pleaded that they had equal rights with the plaintiffs so as to deprive them of any preference. The plaintiffs in their turn brought a second suit to pre-empt this transaction, alleging it to be one of sale The court of first instance dismissed the plaintiffs' suits. On appeal the plaintiffs' suit to pre-empt the sale-deed has been decreed, but the other suit has been dismissed on a finding that the transaction was really one of gift. The defendants come up in second appeal and urge that in consequence of the finding that they had acquired a share in the mahal by virtue of a deed of gift the suit to pre-empt the sale ought to have been dismissed. This contention, in our opinion, must prevail By reason of the acquisition of an additional share in the mahal by gift, the defendants destroyed the plaintiffs' right of pre-emption, they no longer had a right to be substituted in place of the vendees when the time for the passing of the decree came. No decree in their favour could, therefore, be passed in view of the provisions of section 19 of the Agra Pre-emption Act This interpretation of the section has been accepted in the case of *Qudrat-un-nissa Bibi* v *Abdul Rashid* (1) with which we agree The result, therefore, is that this appeal must be allowed and the decree of the lower appellate court set aside We restore the decree of the court of first instance, with this variation that we think that the plaintiffs should be allowed their costs of the first court inasmuch as they were perfectly justified in instituting the suit on the date when they did bring it The plaintiffs, however, must pay the costs of the defendants in the lower appellate court as well as in this Court

Appeal allowed

(1) (1926) I L R , 48 All , 616

REVISIONAL CRIMINAL.

Before Mr Justice Iqbal Ahmad.

BHURA AND OTHERS *v* TARA SINGH AND ANOTHER.*

1926 November, 2.

Criminal Procedure Code, sections 133, 137 *and* 537—*Procedure prescribed by section* 137 *disregarded—Illegality.*

The provisions of section 137 of the Code of Criminal Procedure are imperative, and therefore where the opposite party has appeared and shown cause against an order passed by a Magistrate in proceedings under section 133 it is not competent to the Magistrate to accept an agreement by the parties interested and to pass orders merely on an inspection of the locality The provisions of section 537 of the Code are applicable merely to errors of procedure arising out of mere inadvertence and not to substantive errors of law or to cases where there has been a disregard of the mandatory provisions of the Code. *Ram Mandal* v *Chandra Mandal* (1), followed

THIS was a reference made by the Additional Sessions Judge of Meerut The facts of the case sufficiently appear from the judgement of the High Court

Mr *A. Sanyal*, for the applicants.

Dr *Kailas Nath Katju*, for the opposite parties.

IQBAL AHMAD, J.:—This is a reference under section 438 of the Code of Criminal Procedure by the learned Additional Sessions Judge of Meerut, asking this Court to set aside the order, dated the 15th of July, 1926, passed by a Magistrate of the first class, in proceedings under section 133 of the Code of Criminal Procedure and to direct the learned Magistrate to proceed according to the provisions of section 137 of the Code The facts that have led to this reference are shortly these. An application was filed by two persons, Tara Singh and Balwant Singh, under section 133 of the Code of Criminal Procedure. Notices

* Criminal Reference No 573 of 1926

(1) (1915) 21 C W N., 926.

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were issued to the opposite parties, who were the applicants before the learned Sessions Judge. The opposite parties appeared and denied the allegation of the applicants that any encroachment had been made by them on a public way. In short, they showed cause against the order drawn up by the learned Magistrate in accordance with the provisions of section 133 of the Code Nothing further appears to have been done in the case until the 7th of July, 1926, on which day the parties stated that they would be ready to abide by the decision of the court after the court had inspected the locality. The learned Magistrate then inspected the locality and on the 15th of July made his order absolute. Section 137 (1) provides that if cause is shown against the order under section 133 "the Magistrate shall take evidence in the matter as in a summons case." The provisions of section 137 are imperative, and as in this case the learned Magistrate has not followed the procedure prescribed by that section, his order is bad in law. When the opposite party appeared before him and showed cause and when they alleged that what was claimed as a public pathway was not so, the learned Magistrate should have recorded evidence on the matter of the complaint as in a summons case. He was not justified in ignoring the clear provisions of section 137 of the Code and in consenting to act, so to say, as an arbitrator and to decide the matter simply after a local inspection. Consent of the parties or waiver did not vest him with a jurisdiction to proceed in the manner that he did. This was the view taken in the case of *Ram Mandal* v. *Chandra Mandal* (1).

It has been argued by Dr *Katju* who has appeared to oppose this reference, that the irregularity, if any, committed by the learned Magistrate is

(1) (1916) 21 C W N, 926

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cured by section 537 of the Code of Criminal Procedure and that I ought not to interfere with the learned Magistrate's order unless I am satisfied that the irregularity has occasioned a failure of justice. It is to be noted that the provisions of section 537 of the Code are applicable merely to errors of procedure arising out of mere inadvertence and not to substantive errors of law. Section 537 has no application to cases where there has been a disregard of the mandatory provisions of the Code

For the reasons given above I accept the reference, set aside the order of the learned Magistrate, dated the 15th of July, 1926, and direct that he should proceed to dispose of the case according to law

Order set aside

REVISIONAL CIVIL.

Before Mr Justice Lindsay.

1926 November, 2.

GIRDHARI LAL (APPLICANT) *v* JHAMAN LAL (OPPOSITE PARTY) *

Act No. V of 1920 (*Provincial Insolvency Act*), *section* 60—*Insolvency—Sale of insolvent's property by Collector—Civil court not competent to interfere with sale proceedings*

Where the sale of revenue-paying property of an insolvent has been made over to the Collector under the provisions of section 60 of the Provincial Insolvency Act, 1920, the civil court has no authority of any kind over the Collector in respect of the sale proceedings so entrusted to him

THIS was an application in revision from an order of the District Judge of Saharanpur. The facts of the case are fully stated in the judgement of the High Court.

Dr *Kailas Nath Katju* and Pandit *M N Raina*, for the applicant.

The opposite party was not represented.

* Civil Revision No 101 of 1926

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GHUDRAT LAL v. JEHAMAN LAL

LINDSAY, J. —This application has its origin in certain proceedings in the insolvency court at Saharanpur

It appears that one Abdul Rahim was declared an insolvent and after the receiver had been appointed, steps were taken for the realization of the assets of the insolvent for the purpose of discharging his debts After other property of the insolvent had been disposed of, it became necessary to resort to sale of his zamindari property paying land revenue, and consequently under the provisions of section 60 of the Provincial Insolvency Act (Act V of 1920) the sale of the insolvent's immovable property was entrusted to the Collector Under the section in question, when the Collector is entrusted with the duty of selling property of this kind in insolvency proceedings, he exercises the powers which are conferred on him by paragraphs 2 to 10 of the third schedule to the Code of Civil Procedure. The Collector is, moreover, subject to such rules as have been made by the Local Government in the exercise of the powers conferred upon it by section 70 of the Code of Civil Procedure

It appears that before the Collector was asked to sell the immovable property of the insolvent, some negotiations had been going on between the receiver and one Shah Muhammad Nazir for the purchase of the zamindari property by private sale and in the report of the receiver, dated the 30th of January, 1926, it is stated that this gentleman was willing to give Rs 11.000 for the property

On the 21st of December, 1925, the sale officer who, I understand, is a subordinate of the Collector, brought to sale the zamindari property of the insolvent by public auction The property was bought by

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Girdhari Lal for a sum of Rs. 200, subject to a mortgage the debt under which amounted to Rs. 3,400.

On the 30th of January, 1926, the receiver addressed a petition to the presiding officer of the insolvency court, the first Subordinate Judge of Saharanpur. He pointed out that the price which had been realized by the sale of the property was inadequate, regard being had to the offer of the Rs. 11,000 which had been previously received. The receiver asked the Subordinate Judge not to sanction the present sale but to ask the sale officer to put the property again to sale free of mortgage and to advertise the sale properly On this application the Subordinate Judge recorded in the margin the following order:—"Yes, let it be done." This order was objected to by the auction-purchaser, Girdhari Lal, who went to the Judge in appeal. The learned Judge is of opinion that the order of the Subordinate Judge was a legal order. I do not agree with the opinion of the learned Judge. It is quite clear that, having regard to the fact that the sale proceedings in this case had been transferred to the Collector, the civil court had no authority of any kind to interfere with the proceeding of the sale officer; the Subordinate Judge had no authority to sanction a sale made by the Collector or his subordinate, nor had the sale officer any authority to refer the case to the Subordinate Judge and to ask for sanction. In his judgement the learned Judge says that the sale of the 21st of December was never confirmed by the sale officer, who expressly referred the matter to the Subordinate Judge requesting an early sanction of the same. This procedure is altogether unauthorized. As I have already said, the civil court has no authority

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whatever over the Collector or his subordinate in these proceedings.

This is made clear by reference to sections 70 and 71 of the Code of Civil Procedure and is also apparent from the rules which have been made by the Local Government in the exercise of its powers under section 70 of the Code of Civil Procedure. It follows, therefore, that the order passed by the Subordinate Judge and which is complained of in the present application for revision was an unauthorized order which the Subordinate Judge had no jurisdiction to make. I allow this application, set aside the order of the Subordinate Judge and direct that the case be sent back again through the Subordinate Judge to the court of the Collector. If the receiver has any complaint to make regarding the inadequacy of the price obtained at the auction sale, his duty is to represent the matter to the sale officer, who is the only person who is authorized to deal with a question of this kind The applicant is entitled to his costs in all courts

Application allowed.

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr Justice Lindsay, Mr Justice Sulaiman, Mr. Justice Mukerji and Mr. Justice Banerji

1927 November, 10

CHHATTAR SINGH AND ANOTHER (DECREE-HOLDERS) *v* KAMAL SINGH AND OTHERS (JUDGEMENT-DEBTORS)*

Act No IX of 1908 (*Indian Limitation Act*), *schedule I, article* 181—*Limitation—Execution of decree—Application to revive an application for execution.*

Section 15 of the Indian Limitation Act, 1908, as now amended, does not prohibit, either expressly or by necessary implication, the making of applications for revival which the courts both before and since the commencement of the Act have treated as competent

Where the execution of a decree has been suspended through no act or default of the decree-holder, he has a right to ask the court to revive and carry through the execution proceedings which have been suspended This right can be exercised by means of a proper application to that effect made within three years from the date when the right to make it accrued, that is to say, from the date on which the obstacle to the progress of the execution proceedings was withdrawn

Qamar-ud-din Ahmad v *Jawahir Lal* (1), *Madho Prasad* v *Draupadi Bibi* (2) and *Balwant Singh* v *Budh Singh* (3), referred to

THIS was a Second Appeal which was laid before a Full Bench of five Judges in consequence of an order made by MUKERJI and BANERJI, JJ., who considered it desirable that an authoritative construction of section 15 of the Indian Limitation Act, 1908, should be laid down The facts of the case were as follows :—

The decree-holders obtained a final decree for sale on the 7th of June, 1913 They made an application for execution on the 4th of January 1916,

* Second Appeal No 1573 of 1924, from a decree of J Allsop, District Judge of Aligarh, dated the 16th of April, 1924, confirming a decree of Muhammad Ahmad Ansari Munsif of Hasgh dated the 6th of October, 1924

(1) (1905) I L R 27 All., 884 (2) (1921) I L R., 43 All., 388
(3) (1920) I L R., 42 All., 564

and on the 23rd of March, 1916, the execution proceedings were transferred to the Collector for execution as the property sought to be sold was ancestral.

On the 13th of November, 1916, while the proceedings were still pending before the Collector, a suit was brought to obtain a declaration that the property was not liable to be sold in execution The litigation thus commenced went on till the 6th of July, 1920, when the High Court decided that the property was liable to be sold and dismissed the suit.

By reasons of injunctions issued in the course of this litigation, the execution proceedings in the court of the Collector were stayed, and the bar to the progress of those proceedings was only withdrawn eventually by the judgement of the High Court of the 6th of July, 1920

On the 17th of August, 1920, the Collector took up the execution proceedings again and recorded an order in which it was recited that, in spite of notice given to the son of one of the decree-holders, no steps were being taken to prosecute the case in his court. Being of opinion that there was default in prosecution (*adam pairawi*), he directed that the papers be returned to the court of the Subordinate Judge.

The record reached the office of the Subordinate Judge and was placed before him on the 31st of August, 1920, whereupon, without issuing notice to either of the parties, he ordered that the application for execution should be struck off the list of pending applications, that a note to this effect should be recorded in the appropriate register and that an entry should further be made in the register of decided cases. These orders were clearly based upon the statement

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or opinion of the Collector in his order of the 17th of August to the effect that the decree-holders were taking no steps to prosecute the execution proceedings.

Nothing more was done by the decree-holders till the 10th of January, 1923, when they presented the application which formed the subject-matter of the present appeal. In form this application was one for execution of the decree, drawn up in accordance with the rules prescribed for such applications. It referred to previous applications made for execution but made no mention of the application made on the 4th of January, 1916.

Attached to the application was a statement setting out the history of the suit concerning the property sought to be sold and reciting that this suit had been finally disposed of by the High Court in second appeal on the 6th of July, 1920. The narrative concluded as follows:—"The appeal was decided in favour of the decree-holders by the Hon'ble High Court. The application for execution is, therefore, within time."

It appeared, therefore, that while the decree-holders were styling their application as one for execution, they were claiming that the starting point of limitation for it was the 6th of July, 1920, the date of the High Court's decision.

The courts below, treating the application as one for execution of the decree, applied limitation as provided in article 182 of the first schedule to the Limitation Act.

The decree-holders appealed to the High Court.

Babu *Piari Lal Banerji* and Munshi *Binod Bihari Lal*, for the appellants.

Dr. *M. L. Agarwala*, for the respondents.

The judgement of LINDSAY, J., after stating the facts as above, continued as follows :—

For the decree-holders, however, it is argued that the application, though in form an application for execution, is in substance one of a different character, namely, an application to revive or continue execution proceedings which had been stayed by injunction. It is contended that the proceedings in execution which began with the application of the 4th of January, 1916, were never brought to an end by a judicial order which had the effect of disposing finally of the application so as to make it follow that the decree-holders could not thereafter move for execution except by presenting a new and independent application

It is said that the law does not contemplate the simultaneous prosecution of two identical applications for execution; accordingly if, for the reason given above, the earlier application of the 4th of January, 1916, was still pending, the later application of the 10th of January, 1923, cannot be treated as an independent application for execution to which the rule of limitation contained in article 182 applies

On these grounds then, it is urged that the application of the 10th of January, 1923, must be governed by article 181, inasmuch as it is an application for which no period of limitation is provided elsewhere in the first schedule, or by section 48 of the Code of Civil Procedure and as the right to make the application accrued only on the 6th of July, 1920, when the decree of this Court removed the obstacle to the execution proceedings, the present application, made within three years of that date, is within time.

That was the view taken by the Bench which allowed this appeal *ex parte* on the 8th of March, 1926

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Lindsay, J.

As opposed to this we have the argument that the application of the 10th of January, 1923, was, as it purported to be, an application for execution—a distinct and independent application to which the provisions of article 182 necessarily apply. Dr. *Agarwala* in support of this contention has to rely upon the order of the Subordinate Judge, dated the 31st of August, 1920, in order to show that the proceedings in execution had been definitely brought to a close so that there could be no occasion for their revival.

In our opinion the order of the Subordinate Judge did not produce this effect.

In the first place, it was an improper order—one passed behind the backs of the parties. It is clear that no notice was given to either party.

And, in the second place, the order in its terms was not one justified by any law of procedure. It has been repeatedly observed in judgements of this Court that an order "striking off" a pending application for execution is not recognized by the law. This view was again expressed in a recent judgement of a Bench of this Court where it was said that an order directing an execution application to be "struck off" was not an order sanctioned by any rule (Letters Patent Appeal No. 18 of 1925, decided on the 22nd of March, 1926).

If this be so, it follows that the order of the Subordinate Judge of the 31st of August, 1920, was invalid in law for the purpose of concluding the execution proceedings initiated by the application of the 4th of January, 1916. The only result it could have was that of leaving the proceedings still pending.

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In this view the application of the 10th of January, 1923, was one made during the pendency of execution proceedings and is not to be treated, therefore, as a fresh application for execution It is, in substance, merely an application asking the court to continue the earlier proceedings. As such it is outside the purview of article 182.

Lindsay, J.

Dr *Agarwala* has argued earnestly that applications for revival of previous execution proceedings, though they have for a long time been countenanced by the court, are, as matter of law, no longer competent, regard being had to an amendment of the law introduced in section 15 of the Limitation Act (Act IX of 1908) This section lays down a rule for the computation of the period of limitation according to which the time of the continuance of any injunction or order staying the institution of a suit or the execution of a decree is to be excluded in determining whether the suit, or an application for execution of the decree is brought within time It is pointed out that under the previous Limitation Act (Act XV of 1877) the rule applied only to suits, under the new Act it has been extended to applications for execution of decree The result is, it is said, that there is now a definite provision which in the case of applications for execution forbids any extension of time beyond the limit arrived at by deduction of the period during which the injunction or order has continued

But section 15, even as it now stands, refers to applications for execution of decree, and does not affect to deal with applications which, in substance, are not applications for execution but merely applications to move a court to continue proceedings which had come under suspension by reason of an injunction or order

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Lindsay, J

We are unable, therefore, to hold that the law as amended prohibits either expressly or by necessary implication the making of these applications for revival which the courts both before and since the commencement of the Limitation Act (Act IX of 1908) have treated as competent. We need only refer in this connexion to the judgement of the Privy Council in *Qamar-ud-din Ahmad* v *Jawahir Lal* (1) and to the interpretation put upon that judgement in the case of *Madho Prasad* v. *Draupadi Bibi* (2). At page 385 of the latter report PIGGOTT, J., observes —

"The case of *Qamar-ud-din Ahmad* v *Jawahir Lal* (1), is good authority for the proposition that in a case of this sort where the execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the court to revive and carry through the execution proceedings which have been suspended"

The only other question then is as to the period within which the right of the decree-holder to so apply must be exercised. As to this we think that the law is laid down correctly in a further passage of the judgement of PIGGOTT, J, in the above case which reads as follows —

"He (i e, the decree-holder) can, however, only do this by means of a proper application to that effect . . The application in question would be one for which no period of limitation is expressly provided by the Schedule to the Limitation Act and would, therefore, fall under article 181 of the schedule requiring to be made within three years of the date on which the right to make it accrued."

Obviously the right would accrue upon the date on which the obstacle to the progress of the execution proceedings was withdrawn.

Applying these principles to the case now before us we find that the obstacle was removed on the 6th of

(1) (1905) I L R, 27 All, 394 (2) (1921) I L R., 43 All., 383.

July, 1920, when the order of this Court dismissed the suit which led to the suspension of the execution proceedings commenced by the application of the 4th of January, 1916.

The application of the 10th of January, 1923, which we hold to have been, in substance, an application for revival, was made within three years from the 6th of July, 1920, and so was within time under article 181

For these reasons we allow the appeal, reverse the orders of the courts below and send the case back for disposal to the execution court. The appellants to get their costs here and in the lower appellate court.

BANERJI, J. :—I agree with Mr. Justice LINDSAY and have nothing to add.

SULAIMAN, J. :—I have come to the same conclusion. The application out of which this appeal arises is certainly defective in form. The respondent's contention has been that having regard to its language and the prayer asked for, it must be deemed to be a fresh application for execution and not one for revival. This is a matter not only of interpretation but of inference from all the circumstances. As my learned brethren consider that this can be treated as in substance an application for revival of the proceedings in execution, I am not disposed to differ. This inference will be strengthened if it be held that the previous application has really not yet been finally disposed of

The main contention of Dr. *Agarwala* is that the doctrine of revival which was resorted to by the courts under the old Limitation Act of 1877, is no longer applicable in cases where stay orders or injunctions have been issued The Bench which heard the appeal

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Sulaiman, J.

ex parte held that the proceedings should be revived But the Bench which has referred the case to the Full Bench was inclined to hold that the contention was worthy of much consideration and ought to succeed. The learned counsel for the respondents argues that this doctrine was invented by the court to help the decree-holder at a time when the law contained no provision to safeguard his interest Section 15 of the Limitation Act (Act IX of 1908) is in terms made expressly applicable to cases where execution has been stayed by injunction. He, therefore, contends that the only concession which can be made to the decree-holder is to exclude the time during which the injunctions were in force.

This argument ignores that the principle allowing a right of revival of a previous application is different and distinct from that permitting exclusion of time The question of exclusion of time can only arise when a fresh application for execution is made, whereas it is only a previous application which has not been properly and finally disposed of which can be revived The application for revival is not a fresh application for execution. The principle is based on equity and justice, and the decree-holder is merely requesting the court to take up and continue the proceedings which have not finally terminated but which have remained in abeyance for some reason or other beyond his control

It is not correct to say that the amendment of section 15 was intended to sweep away and replace the old doctrine of revival. The two principles are not co-extensive or identical. In cases where there has been no previous application for execution, but proceedings in execution have been stayed, section 15 may be of help, whereas the doctrine of revival would

have no application. Similarly, there may be cases where after the removal of the bar a previous application has been properly and finally disposed of. In such cases also no question of revival can arise, but the decree-holder will be entitled to deduct the period of suspension in consequence of the stay order or injunction. On the other hand, there may be cases to which section 15 cannot apply and yet the doctrine of revival may be of utility. For instance, execution proceedings may be postponed by agreement between the parties under some arrangement for payment during a definite period after which the decree-holder may request the court to revive it, or proceedings might have been stayed long after an application for execution has been pending for three years, in which case a mere exclusion of the time of suspension would never save a second application from limitation. That the amendment of the new section has not killed the doctrine of revival is shown by numerous cases decided under the new Act in which the old doctrine has been unhesitatingly applied.

The application for revival not being a fresh application for execution cannot be governed by article 182. There is not, however, any special article which would apply, except the omnibus article 181. It has been held in several cases that this article applies to such applications. I may refer to the case of *Balwant Singh* v. *Budh Singh* (1), which was a case under the new Act and in which the same principle was followed. When article 181 applies, the period of limitation is three years from the date when the bar to the execution was removed. In the present case the bar was certainly not removed till the High Court, on the 6th of July, 1920, allowed the appeal and dismissed the suit. The decree-holder,

(1) (1920) I L R., 42 All., 564

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therefore, had three years from this last-mentioned date to go to the court and request it to take up the pending application and continue the proceedings. The mere fact that he did not turn up within a month or two of this date cannot deprive him of his right to move the court within three years The papers were returned by the Collector merely because no steps were taken by the decree-holder within two months. The Subordinate Judge, without even issuing any notice to the decree-holder, struck the case off from the pending file and consigned the record to the record room That order cannot be deemed to be a final disposal of the application. The court could not penalize the decree-holder for not appearing promptly when no notice had been issued to him. The court could not cut down the period of three years which the decree-holder had under article 181 to take steps for revival The order striking off the proceedings, therefore, is no bar to the present application which, in my opinion, is within time.

MUKERJI, J.:—The point for the decision of which this case has been referred to a Full Bench, briefly stated, is whether section 15 of the Limitation Act of 1908 has made it incompetent to a decree-holder to apply for the revival of a previous execution application made by him and whether any application that he makes for the continuance of execution proceedings must be treated as a fresh application.

[The judgement then re-stated the facts of the case. and thus continued :—]

On the 10th of January, 1923, the decree-holders made the application which we have now to consider.

The application, if it be treated as a fresh application for execution of the decree. would be time-barred under the provisions of article 182 of Schedule I of the Limitation Act. in spite of excluding

the period of three years and odd during which the injunctions were in force against the decree-holders. But if the application of the 10th of January, 1923, could be regarded as an application made for reviving the application that was made on the 4th of January, 1916, and if three years time be computed from the 6th of July, 1920, the date of the disposal of the second appeal by the High Court, the application would be in time. The argument on behalf of the judgement-debtors respondents is that after the enactment of section 15 of the Limitation Act of 1908, the application of the 10th of January, 1923, cannot be regarded as anything but a *fresh* application for execution. We have to see whether this argument is sound.

It may be at once pointed out that under the Limitation Act of 1877, section 15, as it then stood, did not cover the case of an execution application, the proceedings under which had been stayed by injunctions issued by courts. It is argued on this ground that whenever an application is made by the decree-holder asking the court to proceed with the execution of his decree, that application must be treated as an application for execution and limitation must be computed having regard to the provisions of article 182 and section 15 of the Limitation Act.

This argument has, on the face of it, the merit of some plausibility, but it is not really correct. There is an essential difference between an application for execution of a decree and an application to a court asking it simply to revive a previous application made for the execution of the decree. It is really a question of fact, a question of the intention of the decree-holder as to what he wants. It is not a question of pure law. If, in the case before us, on the

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Mukerji, J.

31st of August, 1920, before the order was recorded by the Subordinate Judge, the decree-holders had gone to him and asked him, by an application, not drawn up in the usual 10-column form for execution, to send back the case to the Collector for execution. It could hardly have been said that they were applying for an execution of the decree within the meaning of article 182 of the Limitation Act. In that case, the application would have been simply to the effect that the bar to the execution had been removed, that the Collector had wrongly returned the papers to the civil court and that the civil court should re-transfer the case to the Collector and ask him to proceed with the execution. Thus, it seems clear to me, that there is a difference between a fresh or independent application for execution and an application (to the court executing the decree) which does not amount to an "application for execution." It is to an application of the former class that section 15 of the Limitation Act would apply and not to an application of the latter class.

To make the point clearer, I will give an illustration. Suppose the decree passed and sought to be executed is a simple money decree. The decree-holder seeks the execution of the decree by the arrest of the judgement-debtor. The judgement-debtor institutes a suit to obtain a declaration that the decree was obtained by fraud and he obtains an injunction staying the execution of the decree. If after the dismissal of the suit the decree-holder does not ask the executing court to proceed with his application for the arrest of the judgement-debtor, but makes an application to it to attach the property of the judgement-debtor and to execute the decree in that way, this application would be a fresh application and would be governed by article 182 read with section 15

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of the Limitation Act. If, on the other hand, the decree-holder should apply to the court executing the decree to proceed with the arrest of the judgement-debtor, he would be simply asking for a revival of the proceedings which were still pending and his application would not be governed by the rule contained in section 15 of the Limitation Act.

Mukerji, J

Such being my view of the law, let us consider the present case. As already stated, on the 31st of August, 1920, the learned Subordinate Judge "struck off" the execution application without giving the decree-holder an opportunity to make an application before him to proceed with the execution and without intimating to the decree-holder that the court was prepared to proceed with the execution. The order striking off the execution amounts simply to an order sending the papers to the record-room. The order did not amount to an adjudication of the case. In the circumstances, the previous execution application of the 4th of January, 1916, was still pending and had not been substantially or judicially disposed of. The decree-holders, in making their application of the 10th of January, 1923, referred to the fact that the High Court had disposed of the second appeal on the 6th of July, 1920, and relying on that date, stated that their application was within time. It is true that the application was made in the form of an ordinary application for execution with the several columns shown as usual. But it has been repeatedly said that we have to look to the substance of the application and not to the form of it. If it were otherwise, it would entirely depend on the skill of the draftsman whether a certain article of the Limitation Act should apply or any other. This cannot be permitted. We have already shown in our referring

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order that the plaintiffs' application should be treated as an application asking the court to proceed with the previous application To that opinion I still adhere.

In this view of the case the appeal ought to succeed, and I would, therefore, set aside the decrees of the courts below and remand the execution case to the court of first instance and direct it to proceed with the execution in accordance with law.

WALSH, A. C. J. :—I have read the judgements delivered by the other members of the Bench and agree with them generally. I desire to make only two observations. In my opinion, an order made by a Judge upon an application which is still pending that it be "struck off" or "sent to the record room," made either without notice to the decree-holder, or without giving him an opportunity of being heard, is a ministerial order, and cannot be regarded, speaking generally, as a judicial disposal of the application on the merits, though special circumstances may appear which make it so. Secondly, whether an application is in substance a fresh one or an attempt to revive a former one is, as a general rule, a question of fact to be decided with reference to all the circumstances of the case.

BY THE COURT.—For the reasons given above the appeal is allowed and the orders of the courts below reversed, and the case must be sent back to the execution court for disposal according to law. The appellants will get their costs here and in the lower court

Appeal allowed.

REVISIONAL CRIMINAL

Before Mr Justice Boys and Mr. Justice Kendall.

EMPEROR *v.* UMED SINGH *

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Act No. VII of 1878 (*Forest Act*), *section* 31(*g*)—*Forest rules —Construction of rules—"Breaking" and "clearing"*

Where "breaking" of ground only was forbidden by rules framed under section 31(*g*) of the Forest Act, 1878, it was *held* that clearing only, without breaking, was not an offence

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Mr. *L. M Roy* and Mr. *H. M. Roy*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wallıullah*), for the Crown.

BOYS and KENDALL, JJ. .—In this case the question that arises is whether the applicant broke certain ground in a protected forest in contravention of the "Forest Act" and a notification issued thereon. The notification as issued only renders punishable the breaking of ground It is admitted that the applicant cleared some ground. It is quite possible that in the course of clearing or after clearing the ground, he also broke it. If indeed he dug up the root of a single tree he might be held to have broken the ground, but there is no satisfactory evidence on which it could possibly legally be held that he broke any ground at all There is some reference to a note-book of the Magistrate who inspected the ground, but any remarks in such a note-book would not be any evidence in the case.

* Criminal Revision No 534 of 1926, from an order of F. D. Simpson, Sessions Judge of Kumaun, dated the 25th of May, 1926

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We are, therefore, unable to hold it to be proved or to find that the fact has been legally held to be proved that there was any breaking, nor is it possible to hold by any permissible interpretation that the word "breaking" includes mere "clearing." The distinction between the two words is obviously recognized in the Act. It is possible and even probable that the Government intended by the notification to forbid mere "clearing" also, but in view of the distinction made between "breaking" and "clearing" in the Act, it is not possible for us to hold that where "breaking" only is forbidden by the notification, an offence has been committed where there has been only "clearing."

We understand that it is not desired on behalf of the Crown that the case should be sent back for further evidence and a fresh decision thereon. The application must, therefore, be allowed. It is allowed accordingly and the conviction and the sentence of fine are set aside If the fine has been paid, it will be refunded

Application allowed.

APPELLATE CIVIL

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November, 19

Before Mr Justice Boys and Mr. Justice Kendall.

SHIAM LAL (PLAINTIFF) *v.* GIRRAJ KISHORE AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order XXI, rule 73—Execution of decree—Sale—Persons barred from purchasing—Clerk to decree-holder's pleader.

A clerk of a pleader of a decree-holder is not debarred by the terms of order XXI, rule 73 of the Code of Civil Procedure

* Second Appeal No 858 of 1924, from a decree of Kashi Prasad, Additional Subordinate Judge of Aligarh, dated the 18th of February, 1924, confirming a decree of Muhammad Ahmad Ansari, Munsif of Haveli, dated the 29th of November, 1922

from purchasing property sold in execution of the decree. *Alagirisami* v. *Ramanathan* (1), referred to

Rule 73 is intended to prohibit all those who have anything to do with the machinery of the sale having any interest, direct or indirect, in the result of the sale

THE facts of this case are fully stated in the judgement of the Court.

Pandit *Shiam Krishna Dar* and Munshi *Benod Bihari Lal*, for the appellant.

Munshi *Hazari Lal Kapoor*, for the respondents

BOYS and KENDALL, JJ. :—Shib Singh and his brother got a decree (No. 202 of 1912) for costs for Rs. 56 against Fateh Singh. This same Fateh Singh had a revenue court decree (No. 28 of 1916) for Rs. 189-11-9 against Shib Singh and his brother Shib Singh proceeded to execute the decree and attached the decree No. 28 of 1916 of Fateh Singh It was put up for auction, and one question that has been argued before us in this case is whether that was, in view of the terms of order XXI, rule 53, a proper procedure. At the sale the property was purchased by Shiam Lal, the present appellant here, for the sum of Rs. 50 Shiam Lal was the clerk of a pleader of Shib Singh No objection was made by either Shib Singh or by Fateh Singh to this purchase by Shiam Lal, that is to say, neither of them raised an objection that under the terms of order XXI, rule 73, Shiam Lal, as clerk of the decree-holder's pleader, was prohibited from purchasing This is another question with which we are concerned Subsequently Shib Singh actually withdrew the Rs. 50 Next come the proceedings which are alleged by the present appellant to have been, and which indeed appear to have been, fraudulent Fateh Singh, notwithstanding the

(1) (1886) I L R. 10 Mad. 111

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fact that his decree (No. 28 of 1916) had been sold, proceeded to execute it against Shib Singh. What exactly then followed has not been made very clear, but it is clear enough for the purposes of the present appeal that Shib Singh objected, and in the event Fateh Singh and Shib Singh compromised the matter on certain terms, with which we are not concerned. Some time afterwards was instituted the present suit. Shiam Lal did not proceed to execute the decree against Fateh Singh, which he had purchased, but sued Fateh Singh and Shib Singh for recovery of the whole of the amount of that decree as on the date of the compromise. This sum he claimed from Fateh Singh alone, but in the alternative he claimed Rs. 50 from Shib Singh and the balance from Fateh Singh. Shib Singh made no defence. Fateh Singh set up the defence that the purchase by Shiam Lal was a nullity, relying upon order XXI, rule 73, and urging that a pleader's clerk could not buy at the auction sale This defence found favour with the trial court On appeal the lower appellate court not only agreed in this view but went on to hold that in view of the terms of order XXI, rule 53, a decree that has been attached could not be sold and the provided by order XXI, rule 53, must be followed. Shiam Lal appeals to this Court, urging that the view of the lower appellate court on both points was wrong.

The case first of all came before our brother Mr. Justice MUKERJI, who referred it to a Division Bench in regard to the effect of order XXI, rule 73. He pointed out that the question is not covered by any authority and we fully agree with him that it is an important point in relation to the conduct of legal practitioners' clerks. He did not refer the question of the effect of order XXI, rule 53, no doubt because

he had already expressed his views in 85 Indian Cases, page 660, but at the same time he referred the whole case and we have to deal with it.

To consider first the effect of order XXI, rule 73, we are unable to hold that in the ordinary meaning of the language a clerk of a pleader is a person who has "duties to perform in connexion with the sale." First of all, reading the words "or other person" in connexion with the words "no officer" it appears to us that rule 73 is intended to prohibit all those who have anything to do with the machinery of the sale having any interest in the result of the sale. That interest must not be direct or indirect, but we cannot find in this case that there is any suggestion beyond that Shiam Lal was his clerk, that the pleader had an interest in the purchase. We are not, therefore, concerned with the fact that in one aspect the pleader himself may be regarded as an officer of the court, though we may note that it has been held in *Alagirisami* v. *Ramanathan* (1), that the corresponding section then in force did not prevent a pleader from purchasing We are, however, only concerned with the position of a pleader's clerk and we are unable to hold that he was debarred from purchasing by the terms of order XXI rule 73

We turn now to the second point, whether in view of order XXI, rule 53, the sale was a nullity. At the outset, we may say that this question does not really, in the peculiar circumstances of the case, call for determination As regards Shib Singh, the clear facts are that the sale took place at his own instance and but for his action never would have taken place, and, further, he himself reaped the benefits of that sale in that he became entitled to, and did actually

(1) (1886) I L R, 10 Mad., 111

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withdraw. the Rs. 50 purchase money paid by Shiam Lal. As to Fateh Singh, he also must be presumed to have had due notice of the sale. The counsel for Fateh Singh's representative in interest here admits that no objection has been taken hitherto that Fateh Singh had no notice of that sale. Nor is he even in a position to substantiate such an assertion here Neither at the sale nor subsequently has Fateh Singh made any attempt to object to the purchase by Shiam Lal It appears to us clear then beyond doubt that neither Shib Singh nor Fateh Singh can be allowed to object to the sale in the present case.

We think, however, as the point has been argued before us, that it is desirable to express shortly our views as to the effect of order XXI, rule 53. In the case decided by Mr Justice SULAIMAN and Mr Justice MUKERJI, reported in 85 Indian Cases, page 660, reliance was placed on the terms of section 60 of the Code of Civil Procedure, and it was noted that the schedule, of which order XXI, rule 53, constitutes a part, only deals with procedure Of course, in one sense section 60 also only deals with procedure, but there is a clear distinction between the sections of the Act and the schedule, which can be altered or added to at any time by the various High Courts. If it were, therefore, necessary to decide the point, we would not be prepared to differ from the view expressed in that case.

The result is that allowing the appeal, we set aside the decree of the courts below, and decree the plaintiff's claim for recovery of the whole amount as due under the decree No. 28 of 1916 from Fateh Singh alone The appellant will have his costs throughout.

Appeal allowed

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr Justice Lindsay, Mr. Justice Sulaiman, Mr Justice Dalal and Mr. Justice Pullan.

ASKARI HASAN (JUDGEMENT-DEBTOR) *v* JAHANGIRA MAL AND OTHERS (DECREE-HOLDERS) * 1926 *November*, 10, 15.

Civil Procedure Code, order XXXIV, rule 4—Mortgage—Compromise decree providing for payment of mortgage money in instalments—Application for a final decree not necessary

Where a compromise decree provides for the payment of mortgage money in instalments and does not provide for payment on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4, of the Code of Civil Procedure has no application to the case; and consequently it is unnecessary to apply for a final decree in the terms of order XXXIV, rule 5

Jagarnath Umar v *Ram Karan Singh* (1), distinguished. *Bechu Singh* v *Bicharam Singh* (2) and *Ishan Chandra Kundu* v *Nilratan Adhikari* (3), referred to

THIS appeal was sent up to be referred to a Full Bench for determination of a point of law, the nature of which is apparent from the order below —

DALAL and PULLAN, JJ —In this appeal a question arises as to whether the respondents' right has abated owing to the death of Bilas Rai, who was the original decree-holder in a mortgage suit. The decree which was passed was a compromise decree and allowed for payment of the mortgage money in instalments According to the view taken by the Allahabad High Court in *Jagarnath Umar* v *Ram Karan Singh* (1), the proceedings were not concluded by that decree but it was necessary to go on and obtain a final decree under order XXXIV, rule 5, of the Code of Civil

*First Appeal No 316 of 1923, from a decree of Kashi Nath, Subordinate Judge of Bulandshahr, dated the 5th of May, 1923

(1) (1922) 20 A L J, 575 (2) (1909) 10 C L J, 91

(3) (1923) A I R (Pat), 375

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Procedure If this view is followed, the present suit must be held to have abated, as the applicants did not have their names put on record within three months of the death of Bilas Rai. The lower court has followed a ruling of the Calcutta High Court—*Bechu Singh* v *Bicharam Singh* (1), and certain other rulings, both of the Calcutta and the Patna High Courts, which appear to be in direct conflict with the ruling of the Allahabad High Court to which we have referred The Patna High Court ruling is reported in *Ishan Chandra Kundu* v *Nilratan Adhikari* (2). In view of this conflict of authority we are of opinion that the matter should be referred to a larger Bench We, therefore, submit the case to the Hon'ble the Acting CHIEF JUSTICE with a request that he will constitute a Bench for the determination of the following question :—

Whether in a compromise decree passed for payment of mortgage money in instalments, and not on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4, applies, and it is necessary to apply for a final decree under rule 5

The appeal was accordingly laid before a Bench of five Judges

Pandit *Uma Shankar Bajpai*, for the appellant.

Babu *Piari Lal Banerji* and Munshi *Kailas Chandra Mital*, for the respondents

The judgement of the Full Bench (WALSH, A. C J., and LINDSAY, SULAIMAN, DALAL and PULLAN, JJ.) was as follows —

The question referred for the opinion of the Full Bench of this Court is as follows —" Whether in a compromise decree passed for payment of mortgage

(1) (1909) 10 C.L.J , 91 (2) (1923) A.I.R. (Pat), 375.

money in instalments, and not on a fixed date within six months from the date of declaring the amount due, order XXXIV. rule 4, applies, and it is necessary to apply for a final decree under rule 5 " We have heard the arguments of counsel in this case and our answer to the reference is as follows :—Where the compromise decree provides for the payment of mortgage money in instalments, and does not provide for payment on a fixed date within six months from the date of declaring the amount due, order XXXIV, rule 4, has no application to the case; and consequently it is unnecessary to apply for a final decree in the terms of order XXXIV, rule 5

[On receipt of the opinion of the Full Bench, the original Bench, after setting out the answer of the Full Bench, delivered the following judgement :—]

DALAL and PULLAN, JJ :—Thus the suit before us was not really an application for preparation of a final decree but an execution application Consequently there was no question of abatement, and the only point to decide is whether, regarded as an execution application, this was within time. It has been argued before us that the terms of the compromise decree were not observed by the judgement-debtor and that there was actually a non-payment of two instalments on the 15th of November, 1918, and that, therefore, the present application which was made on the 14th of November, 1922, was beyond time. But we do not find that there has ever been a failure on the part of the judgement-debtor to pay two instalments No doubt the instalment due on the 15th of May, 1918, was paid late, that is, on the 19th of May, and the succeeding instalment due on the 15th of November, 1918, was also paid late, namely, on the 23rd of December. But at that time only one instalment was due, because the instalment of the 15th of May

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had been paid and was no longer in default. We find, therefore, that regarded as an application for execution, the present application was within time, and we see no reason to amend the decree of the lower court on a purely technical point

We, therefore, dismiss the appeal with costs, but as this has been regarded now as an appeal in execution, costs will be calculated accordingly.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Pullan

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BENGAL AND NORTH-WESTERN RAILWAY (DEFENDANT) *v.* MATRU RAM AND ANOTHER (PLAINTIFFS) AND BOMBAY, BARODA AND CENTRAL INDIA RAILWAY (DEFENDANT) *

Act No. IX of 1890 (*Indian Railways Act*), *section* 47(*f*)—*Rule framed by railway company—Sale of goods consigned to a railway company for transport without waiting for expiry of prescribed time—Illegal conversion*

Where goods which had been consigned to a railway company for carriage were sold by the company, on account of refusal to take delivery, without waiting for the expiry of the time prescribed by the rules framed under section 47 (*f*) of the Indian Railways Act, 1890, and without a proper bill for wharfage having been presented by the company, it was *held* that the action taken by the company amounted to illegal conversion and the owner of the goods was entitled to damages

THIS was a Second Appeal arising out of a suit for damages against a railway company on account of the alleged illegal conversion of certain goods belonging to the plaintiffs. The facts of the case are stated in the judgement of the High Court

* Second Appeal No. 852 of 1924, from a decree of Baij Nath Das, Second Additional Judge of Gorakhpur, dated the 10th of March, 1924, modifying a decree of Jogendra Nath Chaudhri, Subordinate Judge of Gorakhpur, dated the 11th of September, 1923

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BENGAL AND NORTH-WESTERN RAILWAY v. MATRU RAM

Dr. *Surendra Nath Sen*, for the appellant.

Babu *Piari Lal Banerji* and Munshi *Janaki Prasad*, for the respondents.

DALAL and PULLAN, JJ :—This is a second appeal. Both the subordinate courts have held that the defendant railway company unlawfully converted the goods of the plaintiff, which were in its custody. A consignment of salt was despatched from Kharaghoda (Bombay Presidency) to Deoria in the Gorakhpur district. Out of seven wagon loads, four got damaged through wet, when the salt was received at Deoria. The finding is in the appellant's favour that the company was not responsible for the damage. The plaintiff refused to take delivery and the salt was sold at auction by the company in October, 1921 The salt was booked in June, so the company kept custody of it for less than six months

According to the lower appellate court the company acted unlawfully in selling the salt without giving to the plaintiff fifteen days' clear notice as required by section 55 of the Railways Act In this Court the counsel for the appellant was prepared to satisfy us that proper notice was given We did not accept this additional evidence because the appeal must fail on another ground. Section 55 does not apply because the railway company never presented a proper bill to the plaintiff. It did not come to any determination as to what should be charged for wharfage. At one time it was willing to give up that charge, at another time it was desirous of coming to terms over damages. When the company's demand was not a fixed sum, it cannot have a lien over goods under section 55 and cannot sell to produce a sum equal to the demand. Moreover, the entire consignment cannot be sold under the provisions of that section, but only so much as would satisfy the demand.

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Failing protection of section 55, the company ought to have kept custody of the goods for six months under rule 12 of the rules framed under section 47(*f*) of the Act. This was not done and the sale in contravention of that rule amounted to illegal conversion

It was argued on behalf of the appellant that the plaintiff had not set up a case of unlawful conversion This is inaccurate. In paragraph 6 of the plaint the complaint is made that the goods were sold at auction contrary to law It is true that the trial court did not frame a specific issue on the subject, but the omission has not prejudiced the appellant It was not denied that the goods were sold within six months of arrival and even of booking

The amount of damage has been rightly assessed and we would not interfere with a matter which, under the circumstances of the present case, does not arise in second appeal

It was argued half-heartedly that salt was a perishable article and so the company was authorized to sell it at once. In fact, the company did not sell it at once but about three months after the arrival of the consignment It is clear that the company had no intention of treating salt as a perishable article

We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr Justice Sulaiman.

1926 November, 23

SUKHBIR SINGH (PLAINTIFF) *v.* MANGESAR RAO AND OTHERS (DEFENDANTS) *

Hindu law—Mitakshara—Mayukha—Adoption of orphan—Custom

The Hindu law being a personal law, the presumption is that a Hindu who migrates to another part of India where the law differs from that of his domicile of origin carries with

* First Appeal No 405 of 1923, from a decree of Gobind Sarup Mathur, Subordinate Judge of Saharanpur, dated the 27th of August, 1923.

ium the law of his domicile of origin, unless there is evidence of an intention to adopt the law of his new domicile.

According to the law of the Mitakshara an orphan cannot be validly adopted.

In the present case, a custom to the contrary having been set up as prevailing in the Gwalior State, it was *held* that the custom, if it could be called so, applied only to *jagirs*, and in that case the principal validating factor with reference to adoptions was the recognition of the adopted son by the *Darbar*, in accordance with certain rules framed by the authorities of the State

Dhanraj Johramal v *Soni Bai* (1) and *Ramkishore* v. *Jamnayan* (2), referred to.

THIS was a suit for recovery of possession of a house situated at Hardwar which was acquired by the plaintiff under a sale-deed, dated the 27th of October, 1914, from one Madho Rao The plaintiff's case was that this house, along with certain *jagirs* situated in the Gwalior State belonged to one Nil Kanth Rao, who died some time before 1913. His widow, Musammat Anandi Bai, with the permission of the Gwalior *Darbar*, adopted Madho Rao as a son It was admitted that at the time of the adoption, namely, in 1913, Madho Rao was a married man with several children and that both his parents were dead He, therefore, either gave himself in adoption or he was given in adoption by the *purohit* who performed the ceremonies.

The court of first instance found on the evidence that it had not been established that there was a valid custom under which an orphan like Madho Rao could have been validly adopted It, therefore, dismissed the suit The plaintiff appealed and the existence of the custom alleged was again pressed

Dr *Kailas Nath Katju*, Munshi *Girdhari Lal Agarwala* and Munshi *Sheo Dihal Sinha*, for the appellant

(1) (1925) 23 A L J , 273 (2) (1921) I L R , 49 Calc , 120.

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Babu *Piari Lal Banerji* and Munshi *Sarkar Bahadur Johri*, for the respondents.

The judgement of the High Court (LINDSAY and SULAIMAN, JJ.), after stating the facts as above, thus continued :—

It may be mentioned at the outset that prior to the institution of the suit, the plaintiff had first instituted another suit on the basis of the aforesaid sale-deed for possession of this very house. In the plaint of that suit there was no clear mention as to the way in which Madho Rao had succeeded to the estate of Nil Kanth Rao. It was, therefore, felt that the plaint was defective On the 1st of June, 1916, an application was made for permission to withdraw that suit on account of the flaw, with liberty to bring a fresh suit This permission was granted and the suit withdrawn It might, therefore, have been expected that the present plaintiff, before filing his new plaint, would take care to formulate the alleged custom which is the basis of his claim The only paragraph in the present plaint which mentions this custom is paragraph 2 which states that defendant No 5, namely Musammat Anandi Bai, " according to the practice in the Gwalior State and with the permission of the said State " adopted Madho Rao, and by virtue of which he became the owner of and entitled to the estate of Nil Kanth Rao. This statement amounts to an assertion that there is a territorial custom prevailing in the Gwalior State, not necessarily confined to any particular family, and that in addition thereto the permission of the *Darbar* has some efficacy. The issue which was framed by the trial court on this question was issue No 2 which ran as follows :—

" What is the custom or law of adoption obtainable in Gwalior State ?"

It is, therefore, obvious that no special family custom governing the particular family of Nil Kanth Rao was put forward but a general custom prevailing in the Gwalior State was asserted Nil Kanth Rao was an old resident of Vengrula in Ratnagiri district in the Bombay Presidency. His ancestors had migrated to Gwalior about 100 years ago and were granted some *jagirs* by the *Darbar* They also acquired some property in British India.

On the death of Nil Kanth Rao, his widow undoubtedly applied to the *Darbar* for permission to adopt Madho Rao. In her application she clearly stated that Shankar Rao (which was the former name of Madho Rao) was 40 years old and was literate, and he had little boys There was, however, no express mention that Shankar Rao was an orphan and his parents were dead, and that this adoption would take place in the old *Svayamdatt* form The permission was duly granted to her and there can be no doubt that she did in fact adopt Shankar Rao, who was given the name of Madho Rao after his adoption in 1913. The *jagir* of Nil Kanth Rao devolved on Madho Rao and he was recognized by the Gwalior *Darbar* as his rightful successor at a subsequent stage Musammat Anandi Bai subsequently appears to have changed her mind and repudiated this adoption as stated above She adopted another son in his stead In spite of the objection raised by Musammat Anandi Bai for herself and as guardian of this second adopted boy, Madho Rao was able to obtain a succession certificate from the High Court in Gwalior in the year 1915 It is, therefore, quite clear that, so far as the Gwalior State is concerned, his adoption was duly recognized and acted upon by the *Darbar* It is also an undoubted fact that Madho Rao got the *jagir* in the Gwalior State In 1917 Madho Rao brought a suit against Musammat Anandi Bai in the High Court of Bombay on the

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allegation that he was the adopted son of Nil Kanth Rao and was entitled to all his assets, and that his widow, Musammat Anandi Bai, had removed a box containing valuable ornaments from Gwalior. This suit was tried in the Bombay High Court We are not at present concerned with the reasoning adopted in the judgement It is sufficient to state that the learned Judge of the High Court came to the conclusion that the custom alleged by Madho Rao should not be accepted This judgement was affirmed in appeal

There can be no doubt that the family of Nil Kanth Rao, when it resided in the Bombay Presidency, was governed by the Mitakshara law as modified by the Mayukha law Under the law there can be no question that an orphan, i e , one whose parents are not alive to give him away in adoption, cannot be validly adopted. That this is the well recognized Mitakshara law admits of no doubt We may refer to a case recently decided by the Privy Council, *Dhanraj Johrumal* v. *Soni Bai* (1). At the same time it cannot also be doubted that if a custom is proved under which such adoptions do take place, they would have to be held to be valid A case in point is the case of *Ramkishore* v. *Jainarayan* (2) where the adoption of an orphan was held valid under a custom by their Lordships of the Privy Council Every case, therefore, must depend on its own circumstances and evidence. The burden lies on the plaintiff heavily to prove a special and unusual custom set up by him We have, therefore, examined the evidence which is relied upon in support of that custom. A number of witnesses have been produced who have stated generally that married persons and orphans can be adopted in Gwalior, but when pressed further in cross-examination they had to admit that the only instance that they could state of an orphan having been adopted was that of Lakshmi Maharaj.

(1) (1925) 23 A L J , 973 (2) (1921) I L R , 49 Calc , 120

the father of witness Wasdeo Maharaj A number of cases of married men having been adopted have, however, been mentioned We shall discuss this evidence later on. The circumstance on which the strongest reliance has been placed on behalf of the appellant is that under the rules which are in force in the Gwalior State, there is no prohibition against the adoption of an orphan A book called *Tawarikh Jagirdaran* (History of the Jagirdars) with the rules has been produced before us, and a translation of an extract from it is printed at pages 81 to 83 of the paper-book It appears that the *Majlis Khas* of Gwalior has power to modify the rules which are in force and the rules so modified in 1917 are quoted at length on the pages mentioned above They provide a strict order of relations who can be taken in adoption In each case the sanction of the *Darbar* is necessary They do mention that if the person who stands first in order of preference refuses to be adopted or his father himself shows his unwillingness to give him in adoption, then he shall not be adopted The learned advocate for the appellant contends that this indicates that a grown-up person may be adopted or he may refuse to give himself in adoption Certainly there is nothing in these rules which expressly prohibits the adoption of a grown-up married man whose parents are dead The one instance which has been quoted by many witnesses and has been particularly referred to by the witness Wasdeo Maharaj, is the adoption of his father. This instance has been accepted by the court below as correct When the father of Wasdeo Maharaj was adopted, his parents were dead and his paternal aunt was taken to be in the position of a parent His adoption also has remained unquestioned, and he has duly succeeded to the *jagir*. On behalf of the plaintiff this instance is strongly relied upon On the other hand, the learned advocate for the respondents urges

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that this adoption took place in accordance with the rules in force in the *Darbar* which regulate the succession to *jagirs* and is not a true instance of the enforcement of the alleged custom Undoubtedly not a single witness has been able to cite any instance where a person who was an orphan was adopted and succeeded to the property other than *jagirs*. As regards the *jagirs*, it appears that the main thing is the permission of the *Darbar* Apaji Rao Sitole, who was the Revenue Member of Gwalior, stated that at the time when sanction is asked for, permission is generally granted in accordance with the Hindu law, but permission is also granted in a special way. Wasdeo Maharaj also admitted that among the *jagirdars* no adoption can take place without the permission of the *Darbar* Similarly, Khan Bahadur Munshi Aulad Muhammad, senior member of the Court of Wards, stated that a person whom the *Darbar* wants is adopted and that if in the application for permission to adopt, any *jagirdar* mentions the name of any particular boy whom he wants to adopt, it depends upon the choice of the *Darbar* either to see him or not before granting such permission Ordinarily if the rules laid down by the *Majlis Khas* are complied with, permission is granted, though perhaps on payment of some nazrana; but in special cases permission may even be granted though the adoption is not in strict accordance with those rules. Furthermore, it is quite clear that those rules can be modified by the decision of the *Majlis Khas* Under these circumstances we are of opinion that the rules which are contained in the *Tawarikh Jagirdaran* are the rules laid down by the *Darbar* for regulating the succession to *jagirs*. They in no way embody the record of any particular custom which prevails in Gwalior generally. Those rules are restricted to the *jagirs* and *jagirdars* and are not applicable to the people in Gwalior in general When these rules were

in force, it is not surprising that the father of Wasdeo Maharaj was accepted as the adopted son, although his parents were dead at the time of his adoption. He was a *jagirdar* and succeeded to the *jagir* in the Gwalior State. That instance, therefore, is by no means conclusive as to the existence of a general custom prevailing in Gwalior. Every instance of a married man having been adopted is not really an instance of the alleged general custom, for we have not only to see whether the fact that Madho Rao was a married man was an impediment in the way of his valid adoption, but we have also to see whether in the absence of any proper person to give him in adoption he could have been adopted. Many of the witnesses who stated generally that a custom of adoption of orphans prevailed had to admit in cross-examination that whatever they stated about the adoption of an orphan and married persons was concerned with the *jagirs* only. We may refer to the evidence of Baji Rao Kante, Sardar Nana Sahib and Munshi Aulad Muhammad Khan.

In our opinion there is no inconsistency in the succession of Madho Rao to the *jagir* being recognized by the Gwalior *Darbar* and his not being a validly adopted son regarding other properties the devolution of which does not depend on the State's sanction. One might quote the analogy of the Oudh Estates Act under which *taluqdari* estates would devolve according to the rule of succession and adoption laid down by that Act, whereas succession to the non-*taluqdari* estates may be governed by the personal law of the deceased

We, therefore, agree with the view of the court below that there is no satisfactory evidence before us to show that a custom by which an orphan can be

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adopted exists among the common residents of Gwalior as was alleged in paragraph 2 of the plaint. No special custom of the family has been set up or proved It is undoubtedly the law that when a person migrates from one country to another, there is a presumption that he carries with him his personal law, and, unless there is something to show that he has adopted the law of his new domicile, he must be deemed to be still governed by the old law. No previous act in the history of the family is forthcoming to show that it gave up the Mitakshara law under which it was governed in Ratnagiri and adopted any special law prevailing in Gwalior The mere fact that the family accepted the *jagir* from the *Darbar* would not of itself be sufficient to show that the personal law was necessarily changed Having regard to all these circumstances we are of opinion that it is impossible to interfere with the finding or decree of the court below

The appeal is accordingly dismissed with costs

Appeal dismissed.

Before Mr Justice Dalal and Mr Justice Pullan

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ALI BAHADUR BEG AND ANOTHER (PETITIONERS) v. RAFI-ULLAH AND OTHERS (OPPOSITE PARTIES) *

Civil Procedure Code, order XXII, rules 4 and 10—Mortgage—Death of judgement-debtor after passing of preliminary decree—No application for substitution within prescribed time

A preliminary decree in a mortgage suit was passed on the 13th of May, 1920 The judgement-debtor died in July, 1920 No application for substitution was made, but the decree-holder applied for a final decree on the 12th of May, 1923

* Second Appeal No 2267 of 1925, from a decree of Tufail Ahmad, Additional Subordinate Judge of Shahjahanpur, dated the 31st of August, 1925, confirming a decree of Banarsi Das Kankan, Munsif of Tilhar, dated the 16th of September, 1924

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Held, that the application was in order *Tularam* v. *Tukaram* (1), not followed *Lakshmi Achi* v *Subbarama Ayyar* (2) and *Dakoju Subbarayudu* v. *Musti Rama Dasu* (3), referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants

Maulvi *Mushtaq Ahmad*, for the respondents.

DALAL and PULLAN, JJ.:—The question arising for decision in this second appeal is whether the suit has abated as no application was made for substitution within the time prescribed after the death of the judgement-debtor A preliminary decree for sale in this mortgage suit was dated the 13th of May, 1920 The judgement-debtor died in July 1920, and admittedly no application for substitution was made prior to the application for final decree on the 12th of May, 1923 It has been argued that in a case of this kind order XXII, rule 4, does not apply, because of the use of the words "right to sue," and rule 10 is more applicable to this case This view is based upon a decision of the Nagpur court to which we have been referred, *Tularam* v *Tukaram* (1) But we do not find ourselves in agreement with the reasoning in that decision In our opinion the law has been more correctly laid down by the Madras High Court, in *Lakshmi Achi* v *Subbarama Ayyar* (2) and in a later ruling in *Dakoju Subbarayudu* v *Musti Rama Dasu* (3) *Mutatis mutandis* the observations of the learned Judges in that case are applicable to the one before us They pointed out that rule 10 can only apply when an application under rule 3, here rule 4, is barred In that case every condition required by rule 3 was present and here every condition required by rule 4 is present

(1) (1920) 64 Indian Cases, 307 (2) (1915) I L R, 39 Mad, 486
(3) (1921) 68 Indian Cases, 942

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The judgement-debtor died after the passing of the preliminary decree and the right to sue, which includes the right to continue the suit, survived The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr Justice Kendall.

EMPEROR *v.* RAMAN LAL.*

1926 November, 24

Criminal Procedure Code, sections 234 and 235—Charge—Several offences of a similar nature extending over a period of more than one year joined together in one charge.

The accused was charged with having, on or about a certain date, committed theft in respect of eight necklaces The evidence, however, disclosed that he had committed criminal breach of trust in respect of two of the necklaces on different dates more than a year apart, and it was not clear as to when he had misappropriated the others.

Held, that although there was technically no misjoinder of charges, the trial was vitiated in the same way as if there had been a misjoinder of charges and this was not a mere irregularity. *Subrahmania Ayyar* v. *King-Emperor* (1) and *Emperor* v *Kalka Prasad* (2), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

Babu *Piari Lal Banerji*, Pandit *Uma Shankar Bajpai*, Babu *Satish Chandra Das* and Munshi *Ram Nama Prasad*, for the applicant

Sir *Charles Ross Alston*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Wahidullah*), for the Crown

* Criminal Revision No 557 of 1926, from an order of Kashi Prasad, Sessions Judge of Muttra, dated the 1st of September, 1926.

(1) (1901) I L R , 25 Mad , 61 (2) (1915) I L.R , 38 All , 42.

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KENDALL, J.:—This is an application for the revision of the order of the Additional Sessions Judge of Muttra upholding the conviction of Raman Lal under section 408 of the Indian Penal Code. The facts of the case are given at length in the learned Judge's judgement. The main point taken on behalf of the applicant is that the trial is vitiated by joinder of charges in respect of eight separate necklaces The applicant had been accused of committing various offences in connexion with his management of a temple, and one of the complaints against him was that he had stolen eight necklaces valued at about Rs. 15,000, which had been in the possession of the temple The Magistrate framed a charge against him to the following effect —

"That you on or about the day following Annakut day of Sambat 1977, corresponding to the 12th of November, 1920, at Gokal, being a servant of Musammat Maha Lakshmi Bahuji, committed theft in respect of eight necklaces valued at Rs 15,000, which necklaces were in the possession of your employer, the said Maha Lakshmi Bahuji."

And the Magistrate found it to be proved that the applicant had not committed theft on any particular day, but that he had committed criminal breach of trust in a series of transactions. The details of all these transactions have not been fully proved; but in regard to two of them, in which the applicant is shown to have pawned two of the necklaces to two different people, the actual misappropriation took place in one case on the 5th of February, 1922, and in the other on the 21st of January, 1924 In regard to the other necklaces, it is not certain when the misappropriation took place.

It is argued on behalf of the applicant that the trial was irregular and offended against the provisions of sections 234 and 235, Code of Criminal Procedure,

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in that the offences for which the accused was tried did not take place within the space of twelve months from the first to the last It has been argued on the other side that, as only one charge had been drawn, it cannot be said that there was any misjoinder of charges. Technically this is correct. What has happened in this case is that a number of transactions have been joined together in one charge, and these transactions certainly did not take place within the space of one year Had the charge been framed under section 408 of the Indian Penal Code, instead of section 381 of the Indian Penal Code, the provisions of clause (2) of section 222 would have demanded that the various transactions which made up the charge should have taken place within the space of one year. The offence in regard to these necklaces being one of criminal breach of trust, and the transaction in regard to each necklace being apparently a separate one, it would be necessary to charge the accused separately with each offence, for every such offence which is charged must be tried separately, unless the provisions of section 234 or section 235 of the Code of Criminal Procedure will enable the court to try two or more of the offences at one time.

Although it may be said that there was technically no misjoinder of charges, as only one charge was drawn, I consider that the trial was vitiated in the same way as if there had been a misjoinder of charges, and this is not a mere irregularity: *Subrahmania Ayyar* v *King-Emperor* (1) and *Emperor* v. *Kalka Prasad* (2) I accept the application for revision, set aside the conviction and sentence for the reasons given above, and direct, as the case is one of considerable importance, that it be tried *de novo* in accordance with law.

Application allowed.

(1) (1901) I L R., 25 Mad., 61. (2) (1915) I.L.R., 38 All., 42

Before Mr Justice Kendall

EMPEROR *v* KISHAN LAL

1926 November, 29

Act No. XXV of 1867 (*Press and Registration of Books Act*), *section* 9, *clause* (*a*)—"*Delivered out of the press*"—*Term not merely synonymous with* "*printed*"

Held, on a construction of section 9(*a*) of the Press and Registration of Books Act, 1867, that the words "delivered out of the press" are not merely synonymous with "printed," but include at least the further processes of folding and binding necessary to make a book out of the printed matter, if not the actual carrying of the book outside the Press.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Satish Chandra Das*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

KENDALL, J. —This is a trivial matter in itself, but it deals with a decision which may be of importance The applicant has been convicted by a Magistrate of an offence under section 16 of the Press and Registration of Books Act of 1867, and fined Rs 5 in the following circumstances —

The applicant is a proprietor of a press and a book-seller, and he had been printing copies of the *Bhagwat Gita* in his press. Under clause (*a*) of section 9 of the Act, he had to deliver copies of the book within one calendar month after the day on which the book had first been *delivered out of the press*, at a place notified by the Government, which in this case was the District Magistrate's office. Copies of the book were ready printed on the 8th, 11th and 15th December, 1925, but they remained in the press for binding, etc., and were not sent out of the press until

* Criminal Revision No 545 of 1926, from an order of Nand Sarup, Magistrate, first class, of Muttra, dated the 1st of April, 1926.

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January. They were received at the District Magistrate's office on the 2nd of February. The trying Magistrate has held that the book must be deemed to have been published as soon as it was issued from the press, by which he apparently means as soon as the process of printing had been completed. I do not agree with this pronouncement on the definition of what constitutes publication. The word "publication" is, however, not used in clause (*a*), section 9 of the Act. The words used are "delivered out of the press," and it seems to me that this cannot be held to be equivalent to "printed" The work of printing might be completed before any copy were actually delivered out of the press. When a sheet has been printed, it does not constitute a book; it needs to be folded, corrected and bound before it can take the form of a book, and this process had not been completed on the dates shown in the Magistrate's judgement, viz., 8th, 11th and 15th of December The book does not appear to have been delivered out of the press until January, and there was, therefore, no offence under clause (*a*), section 16 of Act XXV of 1867. In these circumstances, I accept the application, and order that the conviction and sentence of fine be set aside. The fine, if paid, will be refunded.

Application allowed.

Before Mr Justice Kendall

1926 November, 30.

KING-EMPEROR *v.* CHHAJJU AND ANOTHER*

Criminal Procedure Code, section 256—Failure to comply with the provisions of—Irregularity in procedure

The provisions in section 256, Code of Criminal Procedure, are not provisions relating to the mode of trial, and failure to follow those provisions strictly amounts to no more than an irregularity in procedure, and would not be a ground for setting

* Criminal Revision No. 669 of 1926, from an order of H. Beatty, Sessions Judge of Moradabad, dated the 13th of July, 1926.

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aside the conviction, unless the irregularity had occasioned a failure of justice

Subrahmana Ayyar v *King-Emperor* (1), referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

Babu *H P Sen*, for the applicants

The Assistant Government Advocate (Dr *M. Waliullah*), for the Crown.

KENDALL, J.:—This is an application in revision against the appellate order of the Sessions Judge of Moradabad, confirming the order passed against the applicants by the Magistrate under section 110 of the Code of Criminal Procedure. The main argument which has been addressed to me in support of the application relates to the omission of the trying Magistrate to inform the applicants that they could resummon the witnesses for the prosecution for cross-examination at the next hearing. The facts are that the witnesses for the prosecution were examined on the 10th of May, and cross-examined the same day, and the accused (applicants) also made their statements on the same day. On that day the accused were not represented by counsel There was a subsequent hearing on the 19th of May, on which day the accused were represented by counsel All that happened then was that the witnesses for the defence were examined. It is maintained that under section 256, Code of Criminal Procedure, the Magistrate was required to record his reasons in writing if he permitted the accused to cross-examine the witnesses for the prosecution forthwith; and that his failure to do so amounts to an illegality and not a mere irregularity. The decision of their Lordships of the Privy Council in *Subrahmana Ayyar* v *King-Emperor* (1) was referred to in this connexion

(1) (1901) I L R., 25 Mad., 61

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It is perfectly true that their Lordships have decided that disobedience to an express provision as to the mode of trial is not a mere irregularity but an illegality, which will vitiate the proceedings. In the present case there has been disobedience to an express provision of law—at any rate it has not been pointed out to me that the Magistrate recorded reasons and I cannot find that he did. The provisions in section 256, Code of Criminal Procedure, however, are not provisions relating to the mode of trial, and it would be wrong in my opinion to hold that failure to follow those provisions strictly amounts to more than an irregularity in procedure It appears to be clear enough that the accused did not wish to re-summon any witness, for, when they were represented by counsel on the 19th of May, the witnesses were not re-summoned, as I have no doubt they would have been had any application been made on behalf of the accused There has been no failure of justice on account of the irregularity.

Apart from this point, there is little to be said. The Magistrate heard the evidence on both sides, and he called on the applicants to execute bonds after being satisfied by evidence of general reputation that such a course was necessary. Both he and the learned Sessions Judge believed the witnesses for the prosecution. It has been pointed out that the police have admitted that they only opened history-sheets for these applicants quite recently, and that the applicants after being suspected in a dacoity case had been released a few days before the present proceedings were instituted. It appears, therefore, that the police having failed to obtain sufficient evidence against the accused in a definite case, fell back on a second line of attack and caused proceedings under section 110 to be undertaken against them It is possible, however, that the

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accused were suspected in the dacoity case on account of their general reputation, and it is on account of their general reputation that they have been required to furnish bonds The mere fact that these proceedings followed so quickly on their release from the dacoity proceedings is not necessarily proof that the evidence for the prosecution was not given in good faith

For these reasons the application is dismissed.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr Justice Sulaiman

MADAN LAL AND ANOTHER (PLAINTIFFS) *v* JANKI PRASAD AND OTHERS (DEFENDANTS).*

1926 *November*, 30.

Act No VII of 1913 (*Indian Companies Act*), *section* 4—*Unregistered association of more than twenty persons—Illegal partnership—Suit for partition*

No suit will lie for the partition of the assets of an unregistered partnership consisting of more than twenty persons. *Mewa Ram* v. *Ram Gopal* (1), followed *Greenberg* v *Cooperstein* (2), distinguished

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Surendra Nath Sen*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

LINDSAY and SULAIMAN, JJ. —This is a plaintiffs' appeal arising out of a suit for partition of a ginning factory and press The plaintiffs alleged that they were share-holders in this ginning factory and press to the extent of 5/72. They admitted that this partnership had been declared to be invalid, inasmuch as it consisted of more than twenty members. Nevertheless they asked for the relief mentioned above

* First Appeal No 412 of 1923, from a decree of Kashi Nath, Subordinate Judge of Bulandshahr, dated the 16th of July, 1923

(1) (1926) I L R . 48 All., 735. (2) (1926) 1 Ch , 657.

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The defendants, who were other members of this illegal association, pleaded *inter alia* that the suit was not maintainable because the partnership was illegal. The learned Subordinate Judge has dismissed the suit holding that this was a suit by one partner against the remaining partners in respect of illegal partnership transactions, and the plaintiffs could not seek any redress from a court of justice.

The plaintiffs have come up in appeal, and on their behalf it is contended that there is no bar to the court granting them a relief for the actual partition of the property, treating it as belonging to a number of co-owners (though more than twenty in number) and entirely ignoring the existence of any alleged partnership The argument is that the court should not recognize the existence of any such partnership, but it cannot at the same time ignore that the property which exists belongs to a number of co-owners, including the plaintiffs. This question of law has been the subject of decision in a recent case, *Mewa Ram* v *Ram Gopal* (1). Two learned Judges out of three held that a suit brought by some members of an illegal association for any relief was not maintainable and that the well-known rule that where all the parties were equally in fault the law favoured him who was actually in possession was applicable even to a claim for partition where the plaintiff claimed to be in joint possession with the defendants. This being the view of the majority in the case so recently decided, we cannot go behind that expression of opinion.

The learned counsel for the appellants has brought to our notice the case of *Greenberg* v. *Cooperstein* (2) in which TOMLIN, J., remarked that " he does not himself believe that the law is so powerless

(1) (1926) I L R, 48 All, 735. (2) (1926) 1 Ch., 657

that when money is in the hands of persons who have received it for application for an illegal purpose, it cannot protect the contributors or enable them to recover it before it has been applied for this illegal purpose '; and, further, that the case of persons who have subscribed money for an illegal purpose, who come requiring the agents in whose hands it is and who were to apply it for that purpose and have not done so, to return it to them, was different from cases where an illegal association was seeking to recover money lent by it. The case may perhaps be distinguished on the assumption that there the money had not been applied for the illegal purpose and was in the hands of agents who had received it from the plaintiffs However that may be, we are bound by the ruling of our own High Court mentioned above

The result, therefore, is that this appeal is dismissed with costs.

Appeal dismissed

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Banerji

NARAIN DAS (DEFENDANT) *v.* CHIMMAN LAL AND ANOTHER (PLAINTIFFS) *

1926 *November* 30

Act No. V of 1920 *(Provincial Insolvency Act), section* 6, *clause (g)—Act of insolvency—Notice by debtor to creditor suspending payment of debts—Official receiver —Position of receiver after termination of insolvency*

The notice mentioned in section 6, clause (*g*) of the Provincial Insolvency Act may possibly be oral, but it must be a notice in an unambiguous, decisive form, made in a definite form of words to a particular creditor at a definite time, that the debtor has suspended payment of his debts

The expression " suspended payment of his debts " means the entire suspension of his whole indebtedness and a general intention to stop payment to everybody.

* First Appeal No 208 of 1925, from an order of E Bennet, District Judge of Agra, dated the 26th of August, 1925

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NARAIN DAS v. CHHAMAN LAL.

After an insolvency has come to an end and the title of the official receiver is terminated, the insolvency court has no jurisdiction to start an inquiry into the conduct of the receiver regarding any alleged pecuniary loss suffered by the insolvent

THE facts of this case sufficiently appear from the judgement of the Court

Mr *B Malik* and Munshi *Baleshwari Prasad*, for the appellant.

Sir *Tej Bahadur Sapru*, Pandit *Shiam Krishna Dar* and Pandit *Gopi Nath Kunzru*, for the respondents

WALSH, A C J , and BANERJI, J. :—This appeal must be allowed so far as the order adjudicating the appellant an insolvent is concerned. The learned Judge has got himself into somewhat of a tangle in his endeavour to apply the provisions of section 6 Only two alleged acts of insolvency are concerned. First, the third in sub-section (*d*), where the insolvent with any intent to defeat or delay his creditors secludes himself so as to deprive his creditors of the means of communicating with him. That was the only ground alleged in the original petition. That ground was found by the Judge in favour of the insolvent, and, therefore, no order could be made on that. At the hearing the learned Judge framed an issue, which itself suggested the other ground mentioned in sub-section (*g*), namely, "if the insolvent gives notice to any of his creditors that he has suspended payment of his debts." It is difficult to recognize in the form of the issue any relation between it and the provisions of the Act which we have just quoted. Counsel for the petitioning creditors, who are respondents, says that the petition was either in fact or by implication amended so as to include this ground. He also contends that an oral notice under sub-section (*g*) is sufficient. We do not say that it cannot be sufficient, but

it must be a notice in an unambiguous, decisive form, made in a definite form of words to a particular creditor at a definite time, that the debtor has suspended payment of his debts. "Suspended payment of his debts" in this connexion means entire suspension of his whole indebtedness, or as is colloquially said of a bank, notice to stop payment, which, of course, means notice of a general intention to stop payment to everybody The learned Judge appears to have investigated under this issue, No. 4, an allegation that the insolvent was indebted in three hundis Two of them are said not to have been due at this stage. We have not troubled to investigate that question They are admittedly unpaid and are admittedly disputed In order to show his *bona fides*, the insolvent gave security for the amount of these debts in this Court, but everybody has a perfect right to dispute his liability for a debt at his own risk, and to say that because he refused to pay a debt, whether he owes it or he does not, he has suspended payment of his debts within the meaning of this provision, is so novel and startling a proposition that we find it difficult to deal with it The logical result would be that a perfectly honest and respectable man, who refused to pay an extortionate claim against him, might on that account be made an insolvent. It seems clear that the learned Judge misunderstood the Act, and that the provision has no application to the facts as they have been dealt with in the proceedings in the court below We must, therefore, set aside the act of adjudication and discharge the official receiver, and direct him to return to the debtor such property as he holds and the proceeds of any property which he has legitimately realized in the exercise of his powers during his appointment. We agree with counsel for the appellant and for the

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receiver that any costs, reasonably incurred in the discharge of his duty between the date of his appointment and today, the official receiver is entitled to recover from the petitioning creditor, on the ground that people who insist upon an absurd claim of this kind, and allow the judge to amend an application out of existence and pass an order without jurisdiction, do so at their own risk.

There remains the question of a complaint made by the appellant—or an application, it is difficult to describe it precisely—to this Court that an inquiry be made into the conduct of the official receiver. This Court has no jurisdiction to do anything of the kind, though no doubt in an existing insolvency it might as a special case tender advice or give directions to the Insolvency Judge, but now that the insolvency has come to an end and the title of the official receiver is terminated, the insolvency court has no jurisdiction which it can exercise in this insolvency at all The official receiver from today becomes a private person He will, of course, carry out the order of this Court as directed above, and if he fails to carry out the order, he will be liable no doubt to disciplinary measures by this Court, but so far as any alleged pecuniary loss suffered by the appellant is concerned, although we do not sit here to advise the parties, presumably the appellant must seek his ordinary remedy against the official receiver as a private individual in the ordinary way in which any other person can recover compensation for loss suffered as the result of a legal wrong.

As regards the costs of the official receiver appearing here to resist this application, we think that here the applicant has put himself wholly in the wrong, and although we have no jurisdiction to make such an order as he asks for, we direct him to pay the

official receiver's costs of resisting this application. Of course the appellant is entitled to the return of his security which he filed as a condition of being allowed to appeal This order is without prejudice to any question as to whether he is liable or not on the alleged hundis. The hundis must be returned as soon as possible to the creditors The appeal is allowed with costs.

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NARAIN DAS v CHINMAN LAL.

Appeal allowed

REVISIONAL CRIMINAL.

Before Mr. Justice Iqbal Ahmad.

BANKA SINGH *v* GOKUL *

1926 December, 9.

Criminal Procedure Code, section 145 (1)—*Effect of omission to record an order under clause* (1)—*Illegality—Proceedings vitiated*

Held, that the failure of the Magistrate to comply with the provision of clause (1) of section 145 of the Code of Criminal Procedure will vitiate the entire proceedings held in the case

THIS was an application for revision of an order purporting to be passed under section 145 of the Code of Criminal Procedure. The facts of the case are fully set forth in the judgement of the Court

Pandit *Ambika Prasad Pande*, for the applicants.

Munshi *Haribans Sahai*, for the opposite parties.

IQBAL AHMAD, J. —The order of the learned Magistrate, dated the 13th of May, 1926, purporting to be one under section 145, Code of Criminal Procedure, cannot be supported.

It appears that on a petition, dated the 13th of March, 1926, filed by Gokul Ahir, the opposite party, against Sital Rai and certain other persons, the learned Magistrate passed an order purporting to be under section 144, Code of Criminal Procedure,

* Criminal Revision No 575 of 1926, from an order of Ali Ansat, Sessions Judge of Ghazipur, dated the 1st of July, 1926

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directing the attachment of certain crops on plot No 734-9-2 Banka Singh and others, the applicants before me, were no parties to those proceedings When the police wanted to attach the crops the applicants before me filed an application in the court of the District Magistrate, who by an order dated the 29th of March, 1926, set aside the order of the Magistrate directing the attachment of the crops and in the exercise of the powers vested in him by section 436, Code of Criminal Procedure, directed a further inquiry under section 145, Code of Criminal Procedure, with a view to " restoring the crops to the party which was in possession of the same "

After the order of the learned District Magistrate the case came up before another Magistrate who had succeeded the Magistrate who had passed the order under section 144, Code of Criminal Procedure That Magistrate, without recording an order as required by section 145 (1), Code of Criminal Procedure, and without directing a service of that order in compliance with the provisions of section 145 (3) of the Code, proceeded to decide the matter after taking into consideration the written statement filed by the parties and the evidence tendered by them. He has held that the title to and possession of the plot in dispute was with the applicant Gokul and on that finding has passed an order which is unintelligible to me and which is certainly not an order in terms of section 145 (6), Code of Criminal Procedure

It is clear that the provisions of section 145 (1), Code of Criminal Procedure, are mandatory and a disregard of those provisions vitiates the entire proceedings in the case. As already stated, there was no order drawn up by the Magistrate stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the plot

in dispute, nor did he ever require the parties concerned to put in a written statement of their respective claims as respects the fact of actual possession of the subject of dispute. No such order having been drawn up, the provisions of section 145 (3), Code of Criminal Procedure, were not complied with inasmuch as there was no order in existence which could be served on the parties concerned. It is argued before me by the learned counsel who appears in support of the order that the order of the District Magistrate, dated the 29th of March, 1926, should be regarded as an order in terms of section 145 (1) of the Code. I cannot accede to this contention. As I read section 145, Code of Criminal Procedure, it appears to me clear that the Magistrate who has to draw up the order is the Magistrate who after drawing up the order proceeds to decide the case. It may be that a District Magistrate, after drawing up an order under section 145 (1) and after taking cognizance of the case under section 145, Code of Criminal Procedure, may, under certain circumstances, transfer the case for disposal to a Sub-Divisional Magistrate, but in this case it cannot be said that the learned District Magistrate ever purported to draw up an order under section 145 (1), Code of Criminal Procedure, or having drawn up such an order, ever transferred the case under section 145, Code of Criminal Procedure, of which he had taken cognizance to the Magistrate who eventually decided the same. I cannot treat the order dated the 29th of March, 1926, as an order under section 145 (1) of the Code. It is argued by the learned counsel for the opposite party that the irregularity, if any, is cured by section 537, Code of Criminal Procedure. That section applies to mere errors of procedure arising out of mere inadvertence and does not apply to cases of disregard of a mandatory and imperative provision of

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the Code. The failure of the learned Magistrate to comply with the provisions of section 145 (1), Code of Criminal Procedure, vitiates the entire proceedings held in the case and his order must be set aside Accordingly I set aside the order of the learned Magistrate dated the 13th of May, 1926.

Order set aside.

APPELLATE CIVIL.

Before Mr Justice Dalal and Mr Justice Pullan

1926 December, 14

SRI THAKURJI (PLAINTIFF) v JAIKALI KUNWAR AND OTHERS (DEFENDANTS).*

Bengal Regulation, No XI of 1825, Alluvion and Diluvion, section 4—Land taken away by gradual accretion but restored by sudden change—Custom of dhardhura absent

Where no custom of *dhardhura* is proved to exist, land which is taken away by the river gradually, but restored suddenly, if it is capable of identification, will still remain the property of its original owner.

THE facts of this case sufficiently appear from the judgement of the Court

Munshi *Shiva Prasad Sinha*, for the appellant.

Mr *Sankar Saran*, for the respondents.

DALAL and PULLAN, JJ.:—These two appeals arise out of a dispute between the riparian owners of villages situated on opposite banks of the river Rapti. Appeal No 1025 is between the owners of the village of Shergarh and those of the village of Domingarh, and appeal No 1062 is between the owners of the village of Haraiya on the one side and the owners of the villages of Domingarh and Bahrampur on the other But no contest now remains between the

* Second Appeal No 1025 of 1924, from a decree of Baij Nath Das, First Additional Judge of Gorakhpur, dated the 29th of February, 1924, confirming a decree of Hari Har Prasad, Second Additional Subordinate Judge of Gorakhpur, dated the 24th of April, 1923.

owners of the village of Haraiya and those of Bahrampur because they compromised the matter in the lower court The findings of fact in this case are that up to the year 1300 Fasli the plaintiffs appellants were in possession of the disputed plots which then lay on the south-west side of the river. From the year 1300 to the year 1323 Fasli the land came by gradual accretion into the possession of the owners of the village of Domingarh on the north-east side of the river. In the year 1324 Fasli, by a sudden change of the channel of the river the land was restored to the south-western side, namely, its original position in the villages belonging to the plaintiffs appellants. There is also a finding that no claim of adverse possession has been established on behalf of the respondents, and a further finding that the custom of *dhardhura* is not proved to exist in connexion with these villages. On these findings the lower courts have come to the conclusion that the land came into the possession of the defendants respondents by gradual accretion and so became their property, and that they have not lost the land by the sudden change of the river in 1324 and they are, therefore, still the owners The lower courts believe that their finding is in accordance with section 4 of Regulation XI of 1825, but on this point we are not prepared to agree with the decision. Under the terms of that Regulation, land which gradually accedes to another estate becomes annexed to it That is the general principle. An exception is made in the case where a river by a sudden change of its course breaks through and intersects an estate without any gradual encroachment and joins with another estate without destroying its identity It appears to us that the courts below have read so far only and they have not considered what actually happens in the case of a sudden accretion of this nature The rule goes on

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SRI THAKURJI v. JAIKALI KUNWAR

to say. "In such cases the land on being clearly recognized shall remain the property of its original owner." In the present case the original owners are undoubtedly the plaintiffs appellants. That is a finding of fact which cannot now be assailed There is nothing in the Regulation which lays down what is to happen in a case where land is taken away by the river gradually and restored suddenly. In our opinion the clause which we have quoted above will still apply in such a case and the land will go back to the original owner. We consider this is the legal as well as the equitable view to be taken in a case such as this. We, therefore, allow these appeals with costs, but in the case of appeal No. 1062 the compromise will have effect.

Appeal allowed.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Banerji

1926 December, 15

SARJU SINGH AND OTHERS (DEFENDANTS) *v.* BIJAI BAHADUR SINGH AND OTHERS (PLAINTIFFS) *

Act (Local) No. II of 1901 *(Agra Tenancy Act), section* 193 *(k) —"Standing timber"—Fruit trees not included in the term—Act No X of* 1897 *(General Clauses Act)—Applicability of.*

Fruit trees are not included in the term "timber" or "standing timber," and, therefore, cannot be sold by an officer who is authorized to sell movable property only.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

Munshi *Shiva Prasad Sinha*, for the appellants

The respondents were not represented.

WALSH, A. C. J., and BANERJI, J.:—In our opinion, the Judge's order is technically right

* First Appeal No 40 of 1926, from an order of Ganri Prasad, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, dated the 23rd of January, 1926.

according to the strict view of the law Although in practice the Collector and his sale officers may some times take another view, fruit trees are not included in the term "standing timber." Fruit trees are undoubtedly "other produce of the earth" in the colloquial sense of the word, but when one studies the provisions of section 193, sub-section (*k*), the other produce of the earth is clearly meant to be *ejusdem generis* with growing crops and are clearly mentioned together with growing crops, whereas standing timber is not. It is obvious that it was intended to give special rights over standing timber which may be cut down for buildings from time to time, and which may, therefore, be said to be an ambiguous term It was, therefore, thought by the draftsman necessary to give it a special place in the section That would seem to indicate that fruit trees were not contemplated. The Small Cause Court Judge refers to the General Clauses Act, which includes trees generally in the term "immovable property." He then says that fruit trees are not included in the term "timber" or "standing timber." He is quite right That view was taken by Mr. Justice RAFIQUE in the year 1912, and is still treated as good law. Therefore, these trees should not have been sold by an officer who had only power to sell movable property On the other hand, the defendant has been tricked into buying them by an act of the court or an act of Government officials carrying out Government business In the result, the defendant's money has been utilized to discharge the plaintiff's public debt of paying Government revenue, and we think as a matter of equity that the plaintiff ought not to sue for these trees and set up the mistake made by the officer against the equity of the defendant, without himself doing equity and replacing the

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money by which he has been benefited from the defendant's pocket The whole thing is small and not worth all the trouble that has been taken over it by remanding it for further hearing. The plaintiff has not chosen to appear here, and we think the equitable thing is to make an end of the whole case by declaring that the plaintiff will be owner in possession of the trees when he has repaid to the defendant the sum of Rs 30, the price of the trees, together with the sum of Rs. 9-10-0 representing interest at 6 per cent. per annum from the date of the purchase down to the present moment, the total being Rs. 39-10-0. In other words, we declare that the defendant has a charge to that extent over the trees. If the plaintiff does not pay the Rs. 39-10-0 within six months from today, the trees will become the property of the defendant.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji

1926 *December*, 16

ABDUL AZIZ KHAN (APPLICANT) *v* NANHE KHAN (OPPOSITE PARTY) *

Act No VIII of 1890 (*Guardians and Wards Act*)—*Guardian and minor—Right of father to custody of minor son*

A father is not only the natural guardian, but has an inalienable right to the custody of his minor son, unless there are overwhelming circumstances to the contrary *In re Thain, Thain* v. *Taylor* (1), followed.

THIS was an application by Abdul Aziz for guardianship of the person of his minor son, aged about nine years. The maternal grandfather, Nanhe Khan, contested the application on the ground that he and his wife had been looking after the minor ever since his birth The boy appeared to be fairly well looked after by the maternal grandfather. The mother of the

* First Appeal No 51 of 1926, from an order of H Bennet, District Judge of Agra, dated the 5th of December, 1925

(1) (1926) 95 L J , 292.

minor died about five years ago. Abdul Aziz, being in military employment, had to be away at various stations at which the regiment might be quartered. He used to send some money now and then to the maternal grandfather for the maintenance of the boy Abdul Aziz had married again. On these facts the District Judge, while holding that the father was the legal guardian, refused the application, saying that the matter was for the discretion of the court. Abdul Aziz appealed to the High Court.

Pandit *M. N. Raina*, for the appellant.

Dr *M Waliullah*, for the respondent

WALSH, A. C. J., and BANERJI, J. —In our opinion this appeal must succeed The Judge is right in saying that it is a matter for his discretion—but it must be a judicial discretion, exercised upon recognized principles The recognized principle is that a father is not only the natural guardian but has an inalienable right unless there are overwhelming circumstances to the contrary. The report of the Tahsildar does him great credit. But it is distinguished rather for goodness of heart than of head There is hardly a reason which can be considered adequate to overrule the right of the father It so happens that an English Court of Appeal has recently decided the same point in almost precisely similar circumstances in *In re Thain; Thain* v. *Taylor* (1). The appeal must be allowed and the child restored to the custody of the father We think it better to direct that he, if he can, should go personally to take delivery of the child, after giving 24 hours' notice of his intention to do so. If he is prevented by his duties, he can send one of his women folk with an order signed by him. The appeal is allowed and the appellant must have his costs.

Appeal allowed.

(1) (1926) 95 L J , 292.

Before Mr. Justice Sulaiman and Mr. Justice Boys

1926 December, 20.

LACHMI CHAND (PLAINTIFF) *v* LACHHO AND OTHERS (DEFENDANTS) *

Hindu law—Widow—Surrender by widow in favour of next reversioner—Effect of surrender on alienations previously made—Mortgage.

Where a Hindu widow completely surrenders her widow's estate in favour of the nearest reversioner, the effect of the surrender is not to give the reversioner an immediate right to challenge alienations previously made by her; but the right to do so remains in abeyance until the death of the widow.

Rangasami Gounden v. *Nachiappa Gounden* (1), *Behari Lal* v *Madho Lal Ahir Gyawal* (2), *Segu Chidambarama* v *Sareddi Husainamma* (3), *Sreeramulu* v. *Kristamma* (4), *Singaram Chettiar* v *Kalyanasundaram Pillai* (5), *Ramakrishna* v. *Tripurabai* (6), *Sahadeo Singh* v *Ramnandan Singh* (7), *Vaidyanatha Sastri* v. *Savithri Ammal* (8), and *Prafulla Kamini Roy* v *Bhabani Nath Roy* (9), referred to.

THIS was a suit for sale on a hypothecation bond dated the 16th of February, 1910. The facts were briefly as follows Bakhtawar Lal, the owner of the estate, died leaving a widow Gangadei. Gangadei proceeded to squander the estate. Upon her death Musammat Lachho, her daughter, came into possession For the purpose of challenging some of the transactions entered into by Gangadei, Musammat Lachho raised money by executing a simple mortgage for Rs 5,000, on the 15th of February, 1910, in favour of Baldeo Singh, of certain house property. On the 5th of November, 1917, Musammat Lachho surrendered her rights in the estate of her father in favour of her

* First Appeal No 214 of 1923, from a decree of Shambhu Nath Dube, Subordinate Judge of Dehra Dun, dated the 20th of December, 1922.

(1) (1918) I L R , 42 Mad , 626
(2) (1891) I.L R , 19 Calc., 236
(3) (1915) M W N , 577
(4) (1902) I L R , 26 Mad., 143
(5) (1914) M W N , 735
(6) (1908) I L. R , 33 Bom , 88.
(7) (1907) 4 A L J , 954
(8) (1917) I L R., 41 Mad , 75
(9) (1925) I.L R . 52 Calc , 1018

son Puran Chand, the next reversioner. By that deed she stated:—"I hereby relinquish all my life-interest in the movable property such as household goods and in the immovable property acquired and left by my father, Lala Bakhtawar Lal, deceased, and my son Puran Chand, the reversionary heir has, from this very time, i.e., from the time of execution of this deed of relinquishment, acquired all the rights and interests he would have acquired after my death."

In 1920 Lala Baldeo Singh died leaving as his heir Lachmi Chand, the present plaintiff. On the 14th of February, 1922, Lachmi Chand instituted the present suit for sale. The Subordinate Judge held that the bond was not executed for legal necessity, and that finding was not challenged in appeal. It was further urged before him that, assuming that the alienation was not for legal necessity, still a decree should be passed against the widow alone and the purchaser should be allowed to retain possession until her death. The defendant contended that the surrender having been made, the widow's estate had been effaced. The Subordinate Judge held on this point that "the plaint clearly indicated that the life-estate was at an end" and that this prayer of the plaintiff could not be granted in face of the clear statements in the plaint. He added:—"If the suit had been properly framed it may have been possible that the plaintiff would get some decree, but as it is, the suit cannot succeed."

The suit was, therefore, dismissed, and the plaintiff appealed.

On this appeal—

Munshi *Narain Prasad Asthana* and Munshi *Durga Prasad*, for the appellant.

Dr. *Kailash Nath Katju*, for the respondents.

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LACHMI CHAND v. LACHHO.

The judgement of Boys, J., after stating the facts as above, thus continued :—

The only question seriously argued before us was whether the surrender by Musammat Lachho in favour of the next reversioner, Puran Chand, extinguished immediately the mortgage executed by Musammat Lachho in favour of Baldeo Singh, assuming that it was not for legal necessity. A second suggestion made for the respondent, was that even if ordinarily the mortgage would not be extinguished, Baldeo Singh ought to be held estopped from enforcing his mortgage The suggestion was not, however, and, in our opinion, could not be, seriously pressed and the case was argued really only on the basis of what is the correct answer to the first question.

As to this first question we have heard lengthy arguments, which have been of great assistance, and we have had a large number of authorities quoted to us dealing variously with the effect of the death of a Hindu widow, of her re-marriage, of an adoption made by her, and, finally, of surrender or relinquishment by her The result at which I have arrived can, however, be stated with comparative brevity.

I am not satisfied that any of the authorities on the effect of death, re-marriage or adoption can help us very much when we are dealing with the effect of a surrender. There can be no question but that the effect of death, re-marriage and adoption is governed solely by considerations strictly of Hindu law; while the doctrine of surrender owes its birth to judicial decisions. These propositions will not, I think, be disputed I could not put it more forcibly than it is stated by KUMARSWAMI SASTRIYAR, J., in *Vaidya Natha Sastri* v. *Savithri Ammal* (1). The learned Judge was there considering the effect of adoption.

(1) (1917) I L R , 41 Mad , 75, (96 and 90).

At page 96 he said :—" So far as reversioners are concerned, their position is quite different from that of an adopted son " and at page 99 :—" Reference has been made to cases where it has been held that a reversioner to whom the widow surrenders the estate (and thereby accelerates the succession) cannot sue to set aside the alienations made by her till she dies These cases have, in my opinion, no bearing or application to cases of adoption by the widow The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has no basis in Hindu Smritis but has been evolved by courts of justice on general principles of jurisprudence. An anticipation of interest involved by the theory of relinquishment or the defeasance of an ulterior interest by the intermediate acts on the part of the widow are hardly contemplated by the Hindu law-givers It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract. "

There are many other points which readily suggest themselves which differentiate death from re-marriage, adoption or surrender, which differentiate death and adoption from a re-marriage or surrender; and which differentiate adoption from surrender

To allot to each of these differences its exact value would be an impossible task But the differences exist, and particularly in view of the further fact that the whole doctrine of surrender is the creation of judicial decision, I do not think it would be in the least degree safe to apply to surrender cases dealing with either of the other three incidents

If the proposition which I have quoted above as stated by KUMARSWAMI SASTRIYAR, J., is correct and I accept it as correct, then it appears to me that the question of the effect of surrender has to be approached, firstly, from the standpoint of the ordinary

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Boys, J.

law which would be applicable to persons who were not necessarily Hindus: while, secondly, the result arrived at must be controlled by any authoritative pronouncements that there may be by their Lordships of the Privy Council declaratory of the effect of a surrender by a Hindu widow.

As to the first aspect, it does not appear to me material whether we regard the doctrine of surrender, though imported, as now a part of Hindu law or not. Assuming that it is now to be regarded as an integral part of Hindu law, the principle has been imported by judicial decisions and there is no reason why a further complementary principle should not be imported where such importation is vitally necessary to prevent in certain circumstances the law being made use of to perpetrate flagrant fraud.

Approaching the problem then, beyond doubt a difficult problem, in this way, the first question to be asked is "what would ordinarily be the effect of such a surrender?" Clearly the mortgagee's rights would remain intact. If certain rights exist in *A* and he detracts from those rights by granting for valuable consideration a portion of his rights to *B*, he clearly would not be allowed to transfer all his rights to *C* inclusive of the rights which he had already transferred to *B*. *B's* rights would survive.

Whatever early Hindu law may have been, it is now clearly established by judicial decision that a Hindu widow, though her estate cannot be described as a life-estate, can, apart from surrender, adoption or re-marriage, bind the estate in effect for her own life, even without necessity; in other words, a Hindu widow, who makes a transfer for consideration, cannot repudiate that gift or transfer.

If she cannot repudiate, on what principle can it be held possible for her to defeat such an alienation by surrender?

It is important here to bear in mind steadily that the whole doctrine of surrender is the creation of judicial decision. It was unknown to the Hindu law. Applying then again the principles of the ordinary law, on what principle can a reversioner, who, though he of course takes as heir to the last male holder, *actually comes prematurely into his reversion by the act of the limited owner*, claim to reap the benefit of what must be regarded, if the mortgagee's rights are to be defeated, as the limited owner's immoral act?

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It is clear that a grantee cannot ordinarily repudiate the prior act of his grantor in favour of another person. It is, of course, true that a Hindu widow surrendering the estate cannot be correctly described as the grantor of the estate to the reversioner. The reversioner succeeds not to the estate of the widow but to the estate of the last male owner. But the widow is in the position of the benefactor of the reversioner. It is by her act that the reversioner comes prematurely into his estate, and her position is, as it appears to me, for the present purpose at least, very analogous to that of a grantor.

So far then, I would hold that the doctrine of surrender having been imported into Hindu law by judicial decision, we are entitled, in the absence of authority to the contrary, to import the complementary rule, essential to the prevention of fraud, that the widow cannot by making a surrender defeat rights created by herself and creation of which was within her authority, and the reversioner cannot claim on the basis of the surrender to defeat such rights. This, however, does not conclude the matter. Left at this point, the result would have to be stated as follows. A widow has surrendered, to the person who was the next reversioner at the time of the surrender, the

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whole of the estate as it existed in her Let us suppose that she received from the last male owner four villages A, B, C and D, of which she has kept intact three. A B, C, while she has mortgaged the village D *The whole estate existing in her* at the time of the surrender consists of the villages A, B and C and the equity of redemption only in D This whole estate she surrenders and *thereby* wipes out the whole estate as existing in her. The next reversioner at the time of the surrender, let us call him X. receives then the whole of the villages A, B and C, but only the equity of redemption in the village D.

It is clear, however, that as the next reversioner inherits not from the widow but from, and the estate of, the last male owner, he must have a right to challenge the necessity for the mortgage. The questions then that call for determination are, when does that right vest in the reversioner and is it exerciseable immediately it has vested or at what time.

The right to challenge is not a right which constituted any part of the widow's estate, and cannot be said to have been conferred on him by the widow. It is a right which owes its origin solely to the fact that he is the representative of the last male owner. That right must, therefore, vest in him immediately the widow has surrendered her whole estate to him, that is to say, on the date of the surrender. If we were to hold otherwise and that it only vested in the next reversioner upon the death of the widow, it might be that the person who was the next reversioner at the date of the surrender would not be the next reversioner at the date of the death of the widow, and if it were to be held that the right to challenge did not vest in the next reversioner at the date of the surrender the result would be that the villages A, B, C

and D, in the illustration which we have taken, would vest in the next reversioner at the date of the surrender, while the right to challenge the mortgage would vest in a different person who happened to be the next reversioner at the date of the widow's death. This would be obviously impossible and, further, in direct conflict with the proposition clearly established by judicial decision that the whole of the rights of the last male owner vest in the next reversioner at the date of the surrender. It would be impossible to hold that the inheritance was divided, some of the rights going to the next reversioner at the date of the surrender and other rights going to the next reversioner at the date of the death of the widow It is clear, therefore, that the next reversioner at the date of surrender has vested in him not only the rights in the villages A, B and C and the equity of redemption of the village D, but also the right to challenge the necessity for the mortgage.

How then are we to reconcile these two propositions, that the right to challenge the mortgage vests in the next reversioner at the date of the surrender and, secondly, that the person, that is, the next reversioner at the date of the surrender, who had benefited by the act of the person surrendering, the Hindu widow, cannot claim to defeat the rights given to a third party by the person by whose act he himself prematurely comes into the estate?

They do not seem irreconcilable It is in accordance with judicial principles to hold that a right though vested in a particular person at a particular date cannot for a particular reason be enforced by him immediately.

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There is, therefore, nothing in conflict with judicial principles in holding that the right to challenge the mortgage vests in the next reversioner at the date of the surrender, but that, by reason of the fact that the accrual of that right prematurely is due to the action of the widow, he is debarred, until the death of the widow, from challenging transfers made by the widow, which but for the surrender would have been good for the widow's life (leaving aside any question of re-marriage or adoption).

I would, therefore, answer the question by saying that Puran Chand became entitled, so far as this case is concerned, to the estate of the last male owner, his grandfather, Bakhtawar Lal, but that the mortgage in favour of Baldeo Singh will hold good till the death of Musammat Lachho, upon which occurring he will have the right to recover possession of the property, the question of absence of legal necessity having been already determined in his favour by the trial court in this case and not having been challenged before us in appeal

A corollary of this last proposition is that the plaintiff Baldeo Singh is entitled to enforce his mortgage as valid during the lifetime of Musammat Lachho.

Before concluding I would note that we have, of course, been referred to the case of *Gounden* v. *Gounden* (1). If I thought that case applicable to the facts before us, there would, of course, be an end of the matter; but there is not, in my opinion, in what I have said above, any departure from the rule laid down by their Lordships. Their Lordships laid down the rule that " the whole estate " must be regarded as vesting in the reversioner and that the widow must be

(1) (1916) I L R, 42 Mad., 523

regarded as "wholly effaced"; but the language used must surely be read in the light of the facts which their Lordships were considering. That was a case in which the widow had surrendered *only a portion of the estate which remained in her.* In that case the widow had not surrendered her whole estate and had not wholly effaced herself In the present case she has surrendered her whole estate and has wholly effaced herself. She does not claim to have *any* rights remaining in her after the surrender; nor does anybody claim to have any rights through her, created by her after the surrender

SULAIMAN, J.:—The question whether a surrender by a Hindu widow in favour of the next reversioner can affect previous alienations by her is not free from considerable difficulty. In cases of ordinary limited owners or owners of life-estates, it is obvious that the surrender can only be of the interest which remains in the qualified owners after the alienations, and can, therefore, in no way affect those alienations so long as the limited or life-estates last. It would also appear unjust and highly inequitable that a limited owner should by her own voluntary act destroy the validity of her own alienations during her lifetime. Looked at from this point of view, it should seem at first sight that in spite of the surrender made by a Hindu widow, the reversioner who succeeds cannot, during her lifetime, challenge alienations made by her on the ground of want of legal necessity.

On the other hand the estate enjoyed by a Hindu widow is not an ordinary limited estate and is in no sense a life-interest. Her position is distinctly peculiar and it is necessary to consider how far the analogy of surrenders by other limited owners can apply to

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her. It has been repeatedly stated in numerous cases that the widow's interest in her deceased husband's property is not a life-interest. I need only quote a passage from Lord DUNEDIN'S judgement in *Rangasami Gounden* v. *Nachiappa Gounden* (1) :—

"It has often been noticed before, but it is worth while to repeat, that the rights of a Hindu widow in her late husband's estate are not aptly represented by any of the terms of English law, applicable to what might seem analogous circumstances. Phrased in English law terms, her estate is neither a fee, nor an estate for life, nor an estate tail. Accordingly one must not, in judging of the question, become entangled in western notions of what a holder of one or other of these estates might do."

When she holds no estate for life it would be incorrect to say that an alienation made by a widow holds good at least for her lifetime There are many ways recognized by Hindu law in which a widow's estate may terminate before her actual death. For instance, it terminates by her adopting a son or may terminate by re-marriage. The more correct way of stating the law would be that an alienation made by a Hindu widow holds good so long as her widow's estate subsists That surrender is another mode by which a widow's estate can be terminated, must, in view of the pronouncement of their Lordships of the Privy Council, be accepted without question. In *Behari Lal* v *Madho Lal Ahir Gyawal* (2), Lord MORRIS said :—

"It may be accepted that, according to Hindu law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate.

(1) (1913) I L R., 42 Mad., 523 (2) (1891) I L R., 19 Calc., 236 (P.C.)

It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee."

In this passage, however, her estate is called a "life-estate" and is said to be "conveyed" and the reversioner in whose favour the surrender took place is called a "grantee." In the recent case of *Gounden* v *Gounden* (1) Lord DUNEDIN, before quoting the above passage, remarked :—

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"It is settled by long practice and confirmed by decision that a Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death."

If surrender is one of the ways in which a widow's interest terminates it would be difficult to say that although the estate has terminated previous alienations made by her continue to hold good so long as she is not actually dead. The act of surrender involves a total destruction of her entire interest. In the words of Lord DUNEDIN.—

"It is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date."

The effect of the surrender, therefore, is to open out the succession immediately The reversioner in whose favour the surrender takes place is not really in the position of a grantee or transferee from the widow, but succeeds to the estate in his own right as the immediate heir, his succession having been accelerated by the act of the widow. He does not derive title from the widow but derives title from the last

(1) (1918) I L R, 42 Mad, 523

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male owner though his inchoate right has become matured on account of the widow's act. He is under an obligation to the widow who has conferred a benefit on him by removing the obstacle of her own life, but the succession, once accelerated, has opened out to him by virtue of his position as the then heir. The logical result of this conclusion must be to place him in the same position for the purpose of challenging improper alienations as that of an ordinary reversioner who has succeeded on the death of a widow.

Sulaiman, J

I find great difficulty in discovering any true basis for holding that though the reversioner in whose favour the surrender has taken place has succeeded to the estate of the last male owner and derives title from him, he is nevertheless estopped from challenging alienations made by the Hindu widow during her lifetime as if he were a grantee from her. A grantee undoubtedly cannot question the act of his grantor, but the reversioner is not in the true sense of the word a grantee at all. He is certainly not a grantee from the widow of any interest in the property which she has previously sold away, as no interest is left in her If he were a grantee, he would not only have been estopped from challenging the alienation during the lifetime of the widow but would also have been equally estopped from challenging it after her death. That admittedly cannot be the case It seems to me that it would be inconsistent to say that the estate of the widow has been destroyed and the whole estate has become vested in the next reversioner, and yet in order to repudiate improper alienations this reversioner must wait till the widow has died. It would be saying in the same breath that the widow is civilly dead and yet remains an obstacle in the way of the reversioner till she actually dies.

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As Lord DUNEDIN remarked :—"There cannot be a widow who is partly effaced and partly not so " Her effacement must be complete and not partial The whole estate must, therefore, vest in the reversioner entitled to succeed on the date of her effacement, that is to say, on the date of the surrender. Other reversioners who may be entitled to succeed on the death of the widow later on would have no *locus standi* to challenge her alienation, as no part of the estate would vest in them at all. The effect of the surrender involving the effacement of the widow and the extinction of her estate necessarily wipes out all the lines of reversioners and makes the immediate male reversioner a fresh stock of descent.

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Now an alienation made by a widow is binding at least on her. It is, therefore, not possible to say that in spite of her own alienation she still retains a right to challenge it, which she may surrender to the next reversioner. No such right is retained by her at all. The right to challenge devolves on the reversioner not because of the surrender made by her but because of the position he occupies as the representative of the last male owner. I have, therefore, great difficulty in agreeing with what SADASIVA AIYAR, J., said in *Segu Chidambarama* v *Sareddi Husainamma* (1), viz ,—

" that the absolute estate vested in her becomes, by her alienation for her own purposes, divided into two estates, (1) a life-estate enjoyable by the purchaser *during her lifetime* and (2) a reversionary estate to be enjoyed *after her lifetime*, both of which estates or rather the total of which belonged to her husband at his death "

I do not think that the effect of an alienation is to split the estate up into any such two parts, or to

(1) (1915) M W N , 577 (579).

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give to the alienee an interest necessarily co-extensive with her lifetime. The reversionary right to challenge it is no part of the widow's estate at all, and, therefore, could not be surrendered to the reversioner.

Sulaiman, J

In view of the above remarks it is very difficult for me to find any sound basis for holding that the right to challenge the alienation which has devolved upon the reversioner on his succession remains in abeyance so long as the widow is alive. When this right has not been acquired by the reversioner from the widow it is difficult to see on what rule of equitable estoppel the reversioner cannot exercise his right to avoid the alienation.

Whether the foundation of the doctrine of surrender can be sought in certain texts of the Smritis or whether it is a judge-made law engrafted on the Hindu law need not now be considered. Having become a part and parcel of the Hindu law, the doctrine must be applied consistently with the other principles of that law, and not independently of them. Accordingly, if surrender really amounts to her civil death, a destruction of her widow's estate and an effacement of the widow herself, alienations made by her, if improper, must also automatically become voidable at the option of the reversioner. This appears to me to be the only logical result of the reversioner's position. If the question were *res integra*, I would have unhesitatingly held so

One cannot, however, shut one's eyes to the fact that to allow voluntary surrenders by widows in favour of her own daughter, daughter's son, or other near reversioners to defeat all previous alienations by her may be opening a wide door for fraud. In the case of *Sreeramulu* v. *Krishamma* (1), BHASHYAM AYYANGAR, J., remarked:

(1) (1902) I.L.R. 26 Mad. 143 (157).

"A person dealing with a widow reasonably calculates that the alienation will hold good, at any rate, during her lifetime" and would find himself defrauded if, subsequent to the transfer, the widow suddenly surrendered the estate to her own daughter or daughter's son In view of the notions which exist at present, this would certainly be so. The effect of holding that such surrenders can automatically put an end to previous alienations would be to revolutionize the conception which has at any rate so far prevailed There is plenty of authority in support of the view that the surrender is subject to the previous alienations In the case of *Singaram Chettiar* v *Kalyanasundaram Pillai* (1), WALLIS, C J, and HANNAY, J., held that

"it seems clear that a widow cannot, by relinquishing her widow's estate to the reversioner, affect the validity of alienations made by her before such relinquishment which, though not binding on the reversioner, were binding on her for life"

Similarly another Bench of the Madras High Court, in the case of *Kottapalli Subbamma* v *Jatavallabhula Subramanyam* (2), held that

"a surrender by a Hindu widow of her interest in her husband's estate in favour of the nearest male reversioner cannot affect alienations which were made by her prior to the surrender and which, though not binding on the reversioner, were binding on her for life"

In this last-mentioned case SADASIVA AYYAR, J., based his decision mainly on the observations of BHASHYAM AYYANGAR J, in *Sreeramulu* v. *Kristamma* (3), and the judgement of WALLIS, C. J., and HANNAY, J, quoted above NAPIER, J, however,

(1) (1914) M W N, 735 26 Indian Cases, 1.

(2) (1915) I L R, 39 Mad, 1085

(3) (1902) I L R, 26 Mad, 148

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treated the widow as an assignor and the reversioner as an assignee and held that the theory that the surrender by an assignor could invalidate legal rights obtained by an assignee was contrary to equity and good conscience. He held that alienation for life should enure, and the rest of the estate merged into the reversioner, and declined to accept any extension of the reversioner's right beyond this The case of *Sreeramulu* v. *Kristamma* was a case of adoption and was dissented from by the Bombay High Court in *Rama Krishna* v. *Tripurabai* (1), was doubted at Allahabad in *Sahdeo Singh* v. *Ramnandan Singh* (2) and has since been overruled by the Madras High Court itself in *Vaidyanatha Sastri* v *Savithri Ammal* (3). I am unable, as NAPIER, J., did, to treat the possession of the reversioner as that of an assignee of the estate from the widow The doctrine of estoppel based on the principle of grant is, therefore, not applicable. But even in the Madras Full Bench case WALLIS, C J, felt considerable reluctance in differing from the judgement of BHASHYAM AYYANGAR, J, because he thought that there was much to be said for the "view that a Hindu widow should not be permitted, when in the exercise of such powers of disposition she has alienated for consideration her interests in whole or in part, to abridge the interest which she has parted with and derogate from her grant by the subsequent exercise of a power of adoption which she is not under legal duty to exercise"

KUMARASWAMI SASTRIYAR, J., at page 99, in distinguishing cases of surrender, put the whole argument in forceful and terse language :—

"The whole doctrine of surrender and consequent acceleration of the estate of the reversioners has

(1) (1908) I L R, 33 Bom, 88 (2) (1907) 4 A L J, 354.
(3) (1917) I L R, 41 Mad, 75

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no basis in Hindu Smritis but has been evolved by courts of justice on general principles of jurisprudence . . . It is clear that the surrender by the widow and the acceptance of the estate by the reversioner are purely matters of contract . . . To a voluntary relinquishment by the widow, based on no considerations of duty to her husband or spiritual benefit, courts have very properly refused to annex the right to defeat alienations made by her which would enure longer but for her voluntary act. As between the widow, the prior alienee and the reversioners claiming title under a subsequent surrender, the alienee has a clear equity to retain possession and the fruits of his purchase till at least the widow dies"

Sulaiman, J

The attempt to invoke the principles of equity is not, however, laid on sure foundation. For if the law is once made clear, anyone who chooses to take property from a qualified owner without valid necessity, takes it subject to the risk of losing it, if the widow's estate terminates earlier than he expected, in any of the ways recognized by law It is difficult to see why equity should help a man who enters into such an uncertain transaction with his eyes open.

The only other case in which this question arose directly is the case of *Prafulla Kamini Roy* v *Bhabani Nath* (1). WALMSLEY, J., and PAGE, J., differed in their views, the former holding that a gift by a Hindu widow in spite of a surrender of the estate would hold good for the widow's life, the latter holding that the reversioner immediately after the surrender became entitled to recover possession from the donee Although much of the reasoning adopted by PAGE, J, appeals to me and is in accord with my personal opinion, I feel reluctant, in the face of the other authorities to the contrary, to extend the power

(1) (1925) I L R. 52 Calc, 1018

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of the widow to invalidate her own alienations by a voluntary act of her own for which there is no religious obligation on her. The position of a widow who has surrendered the estate is not quite analogous to that of a widow who has adopted a son or who has re-married Adoption, when directed by her husband, is considered to be a religious obligation, the performance of which is conducive to conferring a spiritual benefit on the deceased and to perpetuate his line A re-marriage, when not permitted by custom, takes the widow out of her husband's family altogether and deprives her of the privileges to which she may have been entitled. A surrender, however, is a purely voluntary act and it may be with or without consideration It would, therefore, by no means work any hardship if a condition is imposed (though, I am afraid, with a certain amount of inconsistency) by courts, which have engrafted this doctrine on Hindu law, that surrenders must be subject to previous alienations made by her. The reversioner who persuades the widow to efface herself may be allowed to take the estate which remains in her possession immediately, and then after her death to avoid alienations which would have been voidable at the instance of a reversioner succeeding in natural course.

In view of the last considerations I am not disposed to differ from the conclusion arrived at by my learned brother

BY THE COURT —Allowing the appeal and setting aside the decree of the lower court, in lieu thereof we grant the plaintiff a decree under order XXXIV, rule 4, against the defendants 1 and 2 for Rs. 15,000 with 6 per cent. interest from the date of suit and costs of both courts

The defendants will have the usual six months from this date for payment of the said amount and in

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default of payment the mortgaged property will be sold subject to the right of Puran Chand and his heirs to recover possession upon the death of Musammat Lachho

Appeal allowed.

Before Mr Justice Dalal and Mr Justice Pullan

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SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY) v MUHAMMAD ISMAIL KHAN AND OTHERS (APPLICANTS) *

Act No I of 1894 *(Land Acquisition Act), section* 24, *clause* (3)—*Acquisition of land for a new market—Owner's old market injuriously affected—Compensation*

With reference to clause (3) of section 24 of the Land Acquisition Act, 1894, a person whose land is expropriated for the purpose of establishing a new market cannot claim compensation on account of a previously existing market on other land of his, at a short distance from the proposed new market, being likely to be injuriously affected by the opening of a new market close by.

So *held* by WALSH, A C J, and PULLAN, J, DALAL, J., dissenting

The Collector of Dinagepur v *Guru Nath Roy* (1), *Rameshar Singh* v *Secretary of State for India* (2), *Guru Das* v *Secretary of State for India in Council* (3), *Cowper Essex* v *The Local Board for Acton* (4), *In re The Stockport Railway Company* (5), *Metropolitan Board of Works* v. *Mc Carthy* (6), and *Hopkins* v *Great Northern Railway Company* (7), referred to

THIS was an appeal by the Secretary of State for India in Council against an award made under section 26 of the Land Acquisition Act, 1894, by the

* First Appeal No 456 of 1923, from a decree of D C Hunter, District Judge of Bulandshahr, dated the 16th of May, 1923

(1) (1897) I L R, 25 Calc, 346 (2) (1907) I L R, 34 Calc, 470
(3) (1900) 18 C L J, 244 (4) (1880) L R, 14 A C, 153
(5) (1864) 33 L J, Q B, 251 (6) (1874) L R, 7 H L, 243
(7) (1877) 2 Q B D, 224

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District Judge of Bulandshahr. The land in question was notified for acquisition under section 6 of the Act, for the purpose of establishment of a market. The persons who owned the land to be acquired were also owners of other land situated about half a mile away, upon which a market already existed The District Judge assessed the value of the land at Rs 1,800. But he also awarded an additional sum of Rs. 6.200 under the provisions of section 23, clause (4), of the Act, which lays down that, in determining the amount of compensation to be awarded, the court shall take into consideration the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner.

Against the latter part of the award an appeal was filed on behalf of the Secretary of State It was conceded that the applicant's own market would suffer by the establishment of another within a distance of half a mile. But it was urged that, even if the applicants' income from their market was reduced on account of the establishment of the Government market, the damage was prospective and did not take place at the time of the Collector's taking possession of the land Inasmuch as at the time of taking possession there was no market on the acquired land, consequently there was no damage *at that time*

The main argument, however, on behalf of the appellant was that the court was barred from taking such damage into consideration by reason of the third clause of section 24 of the Act, which precludes the consideration of any damage sustained by the person interested in the land which, if caused by a private person, would not render such person liable to a suit

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On this appeal—

Mr. *G. W. Dillon*, for the appellant.

Dr *Surendra Nath Sen* and Babu *Surendra Nath Gupta*, for the respondents.

The judgement of DALAL, J, after stating the facts as above, thus continued:—

The first objection is easily answered. The Act requires that the Government shall proclaim the purpose for which the land is to be acquired, and there can be no doubt that as soon as this purpose was proclaimed the market value of the applicants' market was reduced by the fear that its income would suffer diminution by competition of the new market. This was damage sustained by the applicants at the time of the taking possession by the Government of the acquired land. There is nothing prospective or uncertain about it. It is quite possible that the new market may prove a failure and the applicants' old market may retain its custom. Those are considerations for the future. What the Court has to see is whether a prudent man desiring to purchase the market would be influenced or not and would offer a lower price or not, because of the alarm caused by the threatened opening of a market on the acquired land by Government. It stands to reason that the acquisition of this land by Government with the intention of establishing a market thereon will reduce the sale value of the applicants' market.

On a summary consideration, the second objection of the learned Government Advocate raises difficulties in the way of the applicants. The way the learned Government Advocate argued was this: Suppose the acquired land had belonged to a neighbour *A* of the applicants and *A* had opened a market on this land in competition with that of the applicants.

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Postal, J

the applicants would have had no right to sue In our opinion, the difference is that the land did not belong to the Government, and it is the power of the statute which enables the Government to open the market There can be no doubt that under the English law compensation would be allowed. In *Cowper Essex* v. *The Local Board for Acton* (1), the land was desired to be acquired for sewage works under statutory powers incorporating the Lands Clauses Consolidation Act, 1845 Evidence was given that the existence of sewage works, *even if conducted so as not to create an actionable nuisance, depreciated the market value of the appellants' other lands for building purposes* The acquired land was let on long building leases, of the other lands part was in hand, and was let for short periods for brick making The land taken was separated from the other lands, in part by other property of the appellant's and in part by a railway. The jury gave a verdict, in addition to the value of the land taken, for a further sum or damage sustained by reason of the injuriously affecting the other lands by the exercise of the respondents' statutory powers It was held by the House of Lords that the jury was correct in awarding the further sum, as compensation might be awarded for damage to be sustained by reason of the injuriously affecting the appellants' other lands, not only by the construction of the sewage works but by their use. It was further held that the damage was not too remote to form the subject of compensation, even though no nuisance might be caused This decision approved of the decision in *In re The Stockport Railway Company* (2).

The learned Government Advocate argued that those cases depended on the special wording of the Lands

(1) (1869) L R, 14 App Cases, 153 (2) (1864) 33 L J, Q B, 251

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Dalal, J.

Clauses Consolidation Act, 1845, and that their application to India was specifically prevented by the third clause of section 24 of the Land Acquisition Act (I of 1894). We do not agree with this argument. In 1900 a Full Bench of the Calcutta High Court in *Guru Das* v. *Secretary of State for India in Council* (1), held that the principles of these English cases were applicable to the Indian Act. In that case the appellants contended that as the municipality had only taken a portion of their land and intended to use the portion so taken, for the purpose of erecting thereon a sewage discharge dépôt, their adjoining lands would be injuriously affected and they claimed compensation for such injurious affection. The claim appears to have been opposed by the Secretary of State for India on the same ground as is put forward here, that the English cases on the subject were not applicable The learned Chief Justice, in delivering the judgement of the Court, said at page 247 :—

" Now I come to the question of injurious affection, and I think I am doing no injustice to the argument of the learned senior Government Pleader, when I say that although there is a slight distinction in the language of the English Land Clauses Act in the section relating to injurious affection as compared with the language of section 23, sub-section (4), of the Land Acquisition Act of this country, he felt that he could not successfully contend as a matter of law that the principle laid down in the case of *Cowper Essex* v. *The Local Board for Acton* (2) and other similar cases in the Courts of England was not applicable to the case now before us. In my opinion that principle is applicable, otherwise it would be difficult to see to what class of cases section 23 of the Land Acquisition

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The learned Judge of the lower court has based his finding on the ruling of the Calcutta High Court in *The Collector of Dinagepur* v. *Girja Nath Roy* (1). This judgement was approved by another Bench of that Court in *Rameshar Singh* v. *Secretary of State for India in Council* (2).

Dalal, J.

We construe the third clause of section 24 so as to limit it to damage claimed by persons other than those to whom the acquired land belonged. Those are cases like the one of the *Metropolitan Board of Works* v. *McCarthy* (3). In this case Lord PENZANCE said :—

"There are many things which a man may do on his own land with impunity, though they seriously affect the comfort convenience, and even pecuniary value which attach to the lands of his neighbour. In the language of the law these things are *damna absque injuria*, and for them no action lies Why then, it may surely be asked, should any of these things become the subject of legal claim and compensation because instead of being done, as they lawfully might, by the original owner of the neighbouring land, they are done by third persons who, for the public benefit, have been compulsorily substituted for the original owners?"

The claim here was not by the person whose land was acquired but by a neighbour who claimed compensation because of acts done by the Works after acquisition. Similarly, where the tenant of a public house claimed compensation for the loss of profits which he had sustained by reason of a railway company having pulled down the adjoining houses (which did not belong to him and had been acquired by the company from other persons), it was held that

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he was not entitled to compensation, for, if any private person had purchased and pulled down the adjoining property, no action would have lain against him. We are of opinion that it is to provide against such claims, by persons other than the owners of the land acquired, that the third clause of section 24 was enacted.

Dalal, J

Having approved of the lower court's finding that compensation is due to the respondents for injurious affection of their market by the acquisition, we must proceed to determine the amount of compensation As rightly pointed out by the learned Government Advocate, we must take into consideration the time of the Collector's taking possession. In our opinion it is not the correct procedure to make an estimate of the probable loss that the respondents may suffer in future In fact, there may be no loss ultimately, and even no market may be constructed by the Government. What we have to consider is the diminution of its value by the general report that a new market was to be started within half a mile of the respondents' market. The real test will be by what percentage the value of the property was decreased on account of the proclamation. We must, therefore, first determine the value of the property. The lower court appears to have made a very generous estimate of the income derived by the respondent from the market, but in default of other evidence we must accept its finding. It fixed the annual income at Rs. 2,685: Rs. 1,155 from *tehbazari* and weighment dues, Rs 130 from Thursday and Sunday markets, and Rs. 1,400 from the *parao* We think that it is a fair estimate to assess the value at sixteen times the income. The value of the property will, therefore, be Rs. 42,960. Such an assessment of value was made by the Full Bench in the case already quoted,

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Guru Das v *Secretary of State for India in Council* (1). We have considered all the circumstances of the acquisition and the distance of the respondents' market from the proposed market. We think that the threat of the opening of a new market did not reduce the value of the respondents' market by more than ten per cent We, therefore, allow them Rs 4,296

Fifteen per cent. shall be added to this sum for compulsory acquisition. We amend the decree of the lower court accordingly and fix the total compensation at Rs. 6,096 with an addition of fifteen per cent.

We direct the parties to bear their own costs of both the courts.

We only direct future interest to run at six per cent. per annum and no past interest as the amount of compensation was in dispute and not finally determined till today.

PULLAN, J. —The question to be determined in this appeal is the right of an owner, whose land has been acquired for the purpose of opening a market, to receive compensation for loss of profits derived from an existing market on other land.

As it is conceded by the learned Government Advocate that the opening of the new market must interfere with the profits derived from another market half a mile distant, it is not necessary to consider the possibility that no loss might be incurred. But the law does not compensate for any and every loss that may befall an owner of land and compensation can be awarded only if the conditions laid down in the Land Acquisition Act are complied with.

If it be held that the statute excludes consideration of the purpose for which the land is acquired, the

(1) (1900) 18 C.L.J. 244

present case is not one in which compensation can be awarded, for the mere acquisition of the plot has no effect on any rights of the landlord in other land. But the cases in which mere acquisition affects rights on or earnings from other land are rare, and it would be a narrow interpretation of section 23, clause 4, of the Land Acquisition Act which would exclude from the word acquisition all consideration of the purpose of acquisition The statute, moreover, is founded closely on the English law, and although the authority of the judgement of the Court of Appeal in *Hopkins* v. *Great Northern Railway Company* (1), may be cited in favour of that view, other decisions, notably the *Cowper Essex* case (2), show clearly that in England the purpose of the acquisition is taken into account. In the latter case damages were awarded because the land was acquired for a sewage farm, which would affect injuriously the value of adjoining property, and the former case found that the mere building of a bridge did not affect the interest of a ferry owner, but the use to which the bridge was to be put. This is not strictly parallel to the case of a market, which as soon as it is opened, that is, as soon as the land is taken over for the purpose of holding a market thereon, *ipso facto* affects the earning capacity of another market in the immediate neighbourhood.

On the other hand the case of a sewage farm gives the owner a better claim than that of a market, for the presence of such a farm will deter other persons from becoming tenants of the adjoining land, and will affect its selling and letting value, whereas the opening of a market may actually enhance the value of the land in the neighbourhood. But the Indian statute does not deal only with the effect of the acquisition of land, it expressly specifies earnings,

(1) (1877) 2 Q B D, 224 (2) (1889) L R, 14 A C, 153

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apart from land. *Finding that the very proclamation of the acquisition of this land for the purpose of opening a new market affects the future earning of the landlord from his existing market, we see no reason to exclude the case before us from the operation of section 23 of the Land Acquisition Act, if that section is complete in itself.*

Pullan, J.

But section 23 of the Act is limited by section 24, which lays down certain circumstances which must not be considered in awarding compensation, although presumably the case otherwise falls within the purview of section 23. The third clause runs as follows, "(the court shall not take into consideration) any damage sustained by him, i e , the person interested, which, if caused by a private person, would not render such person liable to suit." This clause is based on the principles followed by the English courts and we are as much bound to accept the leading English authorities when they favour the Crown as when they appear to favour the public The principle is that unless something is done which would be actionable if done by a private person, there is no right to compensation. Lord CAMPBELL in *In re Penny* (1), said —" Unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed." This dictum was re-affirmed by Lord CHELMSFORD in *Ricket* v. *Directors of Metropolitan Railway Company* (2), and the *ratio decidendi* of the decision referred to above, *Hopkins* v. *Great Northern Railway Company* (3) was that the owner of the ferry could not base an action against a private person who had diverted traffic from the ferry by constructing a bridge. The owner of a

(1) (1857) 7 E & B , 669 (2) (1867) L R , 2 H L , 175 (187).
(3) (1877) 2 Q B D , 224

ferry is in a position closely analogous to that of a person who maintains a market, but the ferry owner has a better right to a monopoly than the owner of the market, and it is not even alleged before us that the respondent in this case would have been able to sustain an action for damages against a private person who started another market in the neighbourhood. It is, therefore, suggested that section 24, clause (3), refers to claims made by third parties, but in my opinion this view is negatived by the wording of the clause. This clause is part of the grammatical sentence which commences the section, and the person who sustains the damage can only be the person who in the second clause has a disinclination to part with the land. He cannot be changed into a person "other than the owner" without express words to that effect. I am unable to construe the section to mean anything else than that a person interested, including the person whose land is acquired, is not entitled to compensation for damages which, if caused by a private person, would not have rendered that person liable to a suit. The damages in the present case are the loss caused to the respondent by the opening of a market in competition with his own market. Had he suffered that loss through the private enterprise of some other person, he would have had no cause of action against him, therefore he has no claim for compensation on this account from the Crown. It is true that in one English case, *In re The Stockport Railway Company* (1), there is a suggested qualification of the English principle, and this has been followed with some hesitation in the *Cowper Essex* decision above quoted. But it must be remembered that the latter decision dealt with the case of a sewage farm, and a private person setting up a sewage farm in such a position as to destroy the value

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(1) (1864) 33 L J, Q B, 251

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of his neighbour's land could hardly be immune from an action for damages. Moreover, there is no indication that the Indian Legislature intended to restrict the application of the general principle of the English law in the manner adopted in one decision. The Act which has, by the broad construction which we have been able to put on section 23, enabled owners to obtain compensation for loss of profits elsewhere, caused by the use for which a portion of their land is acquired, has very clearly restricted the owners to cases in which a similar act by a private person would have been actionable. The Judge of the court below suggests that the act of the private person might amount to trespass, but any attempt by a private person to use the land of another would be *ipso facto* actionable, and it is not the act of acquisition which is to be considered here, but the damage caused by opening a rival market.

I am, therefore, unable to agree with the lower court in awarding damages for loss in respect of the earnings of the owner's other market and *parao*, and it is unnecessary for me to deal with the difficult problem of assessing these damages

In my opinion the appeal should be allowed, and the compensation reduced to the amount allowed by the Collector.

BY THE COURT.—We are not agreed on the question whether the respondents should receive compensation for injurious affection of their land other than the land compulsorily acquired. We refer the following question for decision by another single Judge or Bench.

Under the circumstances of the present case described in the two judgements of the Judges of this

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Bench, are the respondents entitled to receive compensation for the alleged injurious affection of their other land, or are they barred from claiming such compensation under the third clause of section 24 of the Land Acquisition Act?

When the opinion of the third Judge or Bench is received we shall pronounce judgement, if necessary, on the amount of damages to be awarded to the respondents.

The file shall be laid before the Hon'ble Chief Justice for necessary action

[The following is the answer to the reference.—]

WALSH, A. C. J.:—In my judgement the third clause of section 24 of the Land Acquisition Act is a bar to that portion of the claim, allowed by the District Judge, in respect of which this reference has been made under section 98 of the Code of Civil Procedure

The head of claim represents an attempt to capitalize the depreciation in the capital value of the land retained by the claimant, due to the legitimate future use of the land acquired, and to the loss of earnings liable to accrue to the claimant by reason of such user as a market; in other words, to legitimate competition. This is, no doubt, damage by reason of the possibility of the acquisition injuriously affecting the claimant's other property through his earnings. It is no doubt also true that it has been estimated at a capital sum at the time of the Collector's taking possession, representing the depreciation in capital value, caused by the fear likely to be entertained by hypothetical purchasers today of the diminution in future earnings. This would be legitimate enough if it were a legal head of damage But it is damage sustained by the claimant which, if caused by a private person, would not render such person liable to a suit in India,

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and the Court must not, therefore, take it into consideration I cannot agree with my brother MR. Justice DALAL that the "him" in this provision must be taken to relate to a third person. It can only relate "to the person interested" mentioned in the preceding clause, i.e., the claimant.

I think it may possibly lead to misunderstanding to seek guidance from the English decisions, except in so far as it is necessary to explain ambiguous provisions of the Indian statute which seems to have been an attempt to codify the general principles laid down in England. But it is clearly wrong to follow an English decision where doing so would involve doing violence to a statutory provision in the Land Acquisition Act. The effect of the English decisions seems to be to allow compensation where the user necessarily does physical injury, which would ordinarily amount to an actionable nuisance, such as a railway passing so near to a cotton mill as to expose it to the risk of fire and an additional burden for insurance, or a sewage farm so situate as by smell and sentiment actually to affect the standard of comfort or enjoyment and, therefore, the selling value of the land. There is no case like the present in which competition, consequent upon the acquisition, has been treated as actionable *per se* To do so would be to compensate for the compulsory acquisition, which is a special head of damage otherwise provided for.

I think it necessary only to refer to the decisions in India which have been cited I doubt whether I should agree with *The Collector of Dinagepur* v *Girija Nath Roy* (1) But the *ratio decidendi* of that case is put on another ground in the judgement of the Judges who decided *Rameshar Singh* v. *Secretary of State for India* (2), and the decision of the latter case,

(1) (1898) I L R, 25 Calc, 846. (2) (1907) I L R, 34 Calc, 170

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which was not cited before the Subordinate Judge in this case, is clearly an authority for the appellant, with which I agree The decision in *Guru Das* v. *Secretary of State for India* (1), does not touch this case, though, if I may say so, I entirely agree with it. It dealt with land retained by the claimant, which would be injuriously affected by the proximity of the sewage dépôt, amounting ordinarily to an actionable nuisance, and also with compensation for severance I think the appellant is right and that this head of claim is excluded by section 24, clause (3)

[On receipt of the answer to the reference, the original Bench held that the respondent was not entitled to any sum over and above the market value of the land awarded to him]

Appeal allowed

PRIVY COUNCIL.

J. C.*
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March, 4

SHEOBARAN SINGH (PLAINTIFF) v. KULSUM-UN-NISSA AND OTHERS (DEFENDANTS).*

[On appeal from the High Court at Allahabad]

Pre-emption—Insolvency—Custom of Pre-emption—Wajib-ul-arz—Sale by Official Assignee—Provincial Insolvency Act (V of 1907), section 16, sub-section 2(a).

When a share in a village in which a custom of pre-emption exists has vested in the Official Assignee under the Provincial Insolvency Act, 1907, section 16, a sale by him is subject to the custom An Official Assignee takes the property of an insolvent exactly as it stood in his person, with all its advantages and all its burdens

The record in a wajib-ul-arz of a custom of pre-emption is sufficient to establish the custom without oral evidence in confirmation *Dugambar Singh* v *Ahmad Sayed Khan* (1), followed

* *Present* —Viscount DUNEDIN, Sir JOHN WALLIS and Sir LANCELOT SANDERSON

(1) (1900) 18 C L J 244
(2) (1914) I L R, 37 All, 129, L R., 42 I A, 10

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A right of pre-emption recorded in a wajib-ul-arz is to be presumed to be recorded as a customary right, not as arising out of a contract between the co-sharers, or as being merely their wish or intention, unless the language clearly shows the contrary. It is only a right by custom which should be recorded *Returaji Dubain* v *Pahlwan Bhagat* (1), approved

Whether a person entitled to pre-empt loses or does not lose his right if he attends an auction sale of the property and does not bid, he does not lose his right if the auction is of the property together with arrears of rent, all in one lot

Decree of the High Court (I. L. R., 42 All., 402), reversed

APPEAL (No. 149 of 1924) from a decree of the High Court (March 13, 1920) reversing a decree of the Additional Subordinate Judge of Aligarh.

The suit was brought by the appellant who claimed that by custom he had a right of pre-emption in respect of a 15 biswas shâre in a mauza. The share in question had belonged to a co-sharer with the appellant in the mauza, but the owner had been declared an insolvent under the Provincial Insolvency Act, 1907, upon a creditor's application. His property had vested under the Act in the Official Assignee who had sold the share to the first defendant, now represented by the respondents.

The first defendant by his written statement denied the existence of the custom alleged, and pleaded that if there was a custom it was not applicable in the circumstances of the case.

The facts appear from the judgement of the Judicial Committee.

The trial Judge decreed the suit, but an appeal to the High Court was allowed, and the suit was dismissed. The learned Judges (TUDBALL and RAFIQUE,

(1) (1911) I.L.R., 33 All., 196.

J.J.), held that assuming that a custom of pre-emption existed in the village, it did not apply to the sale by the Official Assignee, as the sale was involuntary and was not a sale by a co-sharer. Also they were of opinion that the plaintiff's failure to bid at the auction, of which he had notice, amounted to a refusal to purchase The appeal is reported at I. L. R , 42 All , 402

1927. February 1, 15. *De Gruyther, K. C.*, and *Dube*, for the appellant :—The appellant was entitled to pre-empt. There can be no effectual relinquishment of the right to pre-empt until a sale has been completed, and the right operates in the case of a sale in an insolvency : *Kanhai Lal* v. *Kalka Prasad* (1). That case was rightly decided, since the principle of pre-emption rests upon a right to be substituted for a purchaser who is not a co-sharer : *Gobind Dayal* v *Inayatullah* (2), *Kamta Prasad* v. *Mohan Bhagat* (3), *Budhai Sardar* v. *Sonaullah Mridha* (4), *Subhagi* v. *Muhammad Ishak* (5), *Janki* v. *Girjadat* (6) The decision in *Indraj v Brother Clement*, Missionary (7). was erroneous The effect of the vesting in the Official Assignee is that he is placed in relation to the property in the same position as the insolvent. The statement in the wajib-ul-arz established the custom · *Digambar Singh* v. *Ahmad Sayed Khan* (8), *Balgobind* v *Badri Prasad* (9).

Dunne, K C , and *Wallach*, for the respondents. The appellant's failure to bid at the auction was a renunciation of any right which he had to pre-empt :

(1) (1905) I L R , 27 All , 670
(2) (1885) I L R , 7 All , 775
(3) (1909) I L R , 32 All , 45
(4) (1914) I L R , 41 Calc , 948
(5) (1884) I L R , 6 All , 463
(6) (1885) I L R , 7 All , 492
(7) (1915) I L R , 37 All , 292
(8) (1914) I L R , 37 All , 129; L R , 42 I A , 10
(9) (1923) I L R , 45 All , 413; L R , 50, I A , 195.

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Naunihal Singh v. *Ram Ratan* (1), *Shamsher Singh* v. *Piari Dat* (2), *Nathi Lal* v *Dhani Ram* (3). In any case the custom did not apply, as the sale was not by a co-sharer and was involuntary Further, no custom of pre-emption was proved. The wajib-ul-arz did not use the word "custom"; it really recorded merely an arrangement between the co-sharers, or the views of the co-sharers, as in *Anant Singh* v. *Durga Singh* (4)

DeGruyther, K C, in reply. In *Digambar Singh* v. *Ahmad Sayed Khan* (5), the wajib-ul-arz did not specifically state the right as a custom. Having regard to the duty of the revenue officers to record only customs, a statement in a wajib-ul-arz should be presumed to refer to a custom unless the contrary clearly appears: *Returaji Dubain* v. *Pahlwan Bhagat* (6) The auction sale was not merely of the share but also of the accrued rent.

March 4. The judgement of their Lordships was delivered by Viscount DUNEDIN —

In this case, pre-emption in a share in a village is claimed by a co-sharer as against the buyer from the assignee in bankruptcy of another co-sharer. The claim was decreed by the Subordinate Judge, but his judgement was reversed and the case dismissed by the High Court of Allahabad on appeal.

There was another like suit by another co-sharer

The circumstances are these Rai Bahadur Shri Kishan Das was a co-sharer of the plaintiff and others in the village of Peotha Gokalpur On the 26th of September, 1913, he was declared insolvent by the Bombay High Court, and all his property, including the share in question, was vested in the Official

(1) (1916) I L R, 39 All, 127.
(2) (1916) I L R, 40 All, 690
(3) (1917) 15 A L J., 315
(4) (1910) I L R, 32 All, 363, L R, 37 I A, 196
(5) (1914) I L R, 37 All, 129; L R, 42 I A, 10.
(6) (1911) I L R, 33 All, 196

Assignee of Bombay The Official Assignee put up the property for sale at Aligarh by public auction on the 8th of November, 1914 A bid was made but was not accepted by the Official Assignee, and the sale was re-advertised for the 6th of December, 1914. A bid of Rs 40,000 was made by one Sheoraj Singh, and he was declared purchaser, subject to confirmation by the Official Assignee. On the next day the auctioneer received a private offer of a greater amount The result of the private offer was that the property was sold privately for Rs 41,000 to a purchaser, since dead, who is represented by the respondents. The plaintiff and appellant alleges that there was in this village a customary right of pre-emption among the co-sharers, and that he is entitled to have that right made good It was objected by the respondents that the appellant ought to have exercised his right of pre-emption by bidding at the sale. There was a good deal of discussion as to whether the right of pre-emption was always open until a concluded sale, or whether the person in right of pre-emption, if he finds the property is going to be exposed to public sale, is bound to go there and bid It is unnecessary to consider this matter for this reason, that it appears that what was put up at the auction was not the property pure and simple, but the property plus arrears of rent all in one lot, so that the only sale of the property pure and simple was the private sale, of which, admittedly, the appellant had no notice.

The further defence was twofold and consists of two parts (1) A denial of the custom of pre-emption in the village, (2) an argument that if such pre-emption is assumed or proved, it does not operate against the purchaser at a sale from an Official Assignee in bankruptcy

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As to the custom of pre-emption, the Subordinate Judge held this proved. The High Court did not inquire as to whether this was so or not, they decided in favour of the respondents on the second point on the assumption that the custom was proved Before this Board, however, the respondents strongly urged that no custom had been proved.

Admittedly, the proof in favour of the custom is provided only (for oral testimony may be disregarded) by an entry in the wajib-ul-arz of the village, which is as follows :—

"'Wajib-ul-arz' of mauza Pipiot Gokulpur, pargana Koil, district Aligarh, prepared in 1280 Fash

"Paragraph 18.—As to the transfer of property and the right of pre-emption.—Each co-sharer is entitled to transfer his property, but he should transfer it first to a co-sharer, the descendant of a common ancestor, and in case of refusal on his part to other co-sharers in the village, and if they also do not take it, then to any one he may like If there be any dispute between the transferor and the person having a right of pre-emption as to the amount of price, then it will be decided with reference to the rate at which property is sold in the neighbouring villages."

The respondents argued that a wajib-ul-arz alone is not sufficient, and that the present entry does not actually mention custom, and may, therefore, refer to contract and not to custom.

The weight to be given to entries in wajib-ul-arz has been considered on more than one occasion by this Board.

In the case of *Digambar Singh* v. *Ahmad Sayed Khan* (1), the custom of pre-emption was held good, and it was laid down that a statement in the wajib-ul-arz of a village that there is a custom of pre-emption, which is not in contravention of law, is good *prima facie* evidence of the custom, without corroborative evidence of instances in which it has been

(1) (1914) I L.R., 37 All., 129; L.R., 42 I.A., 10.

exercised And upon the entry in the wajib-ul-arz alone, the custom was held proved.

In the case of *Balgobind* v. *Badri Prasad* (1), though it was a case where it was sought actually to alter the law of inheritance, nevertheless, their Lordships said this —

"When it is not shown by reliable evidence that the settlement officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen."

They found the custom proved.

The respondents appealed to the case of *Anant Singh* v *Durga Singh* (2), where an alteration of the law of inheritance was held not proved, but the *ratio decidendi* is clearly given in the judgement of the Board, where it is said:

"Where, as here, from internal evidence it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing, rather than the ascertained fact of a well-established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed"

The respondents sought to say that the entry here was ambiguous and to criticize it on the ground that it did not use the word "custom" and, therefore, might be a record of either a contract or mere wish and intention On this point their Lordships wish to refer to a very valuable judgement by CHAMIER, J., in a Full Bench judgement in the case of *Returaji Dubain* v. *Pahlwan Bhagat* (3) He points out that the terms of the circulars show that the revenue authorities meant customs of pre-emption to be recorded

(1) (1923) I L R, 45 All, 413; L R, 50 I A, 196 (2) (1910) I L R, 32 All, 363; L R, 37 I A, 196

(3) (1911) I L R, 33 All, 196.

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in brief and general terms, and he sums up the situation thus —

"We have all of us seen wajib-ul-arzes which contain provisions which ought not to be in them In some, no doubt, language may be found which shows clearly an attempt to create a right of pre-emption In others, there is an obvious contract between the co-parceners for a right of pre-emption But where the contrary is not shown, a provision in a wajib-ul-arz relating to pre-emption should be presumed to be the record of a custom, and this rule has been affirmed repeatedly by this Court."

It is also to be kept in view that it is easier to hold established a custom, which, as here, only prov s a well-recognized adjunct to the ordinary law, than it is where the law is said to be actually altered, as, e g., in the case of a change in the rule of succession In the present case their Lordships have no doubt that the entry in the wajib-ul-arz is a record of a custom, and they hold the custom proved

Turning now to the second point, which affords the ground of judgement in the High Court. Their *ratio decidendi* is really contained in a single sentence :—

"Now, in the circumstances of the pre sent case, this being the custom, it is clear that no co-sharer has sold his share at all "

And again :—

"We find it impossible to hold the view that a village custom which refers only to a voluntary sale by one co-sharer of his property can in any way apply to the case of an involuntary sale carried out against his wishes by a court through a Collector or an Official Assignee, or anybody else "

With deference to the learned Judges, it seems to their Lordships that this overlooks one of the fundamental principles of all arrangements for the realization and distribution of a bankrupt's property In every system of law the term may vary, but in all

there is an official, be he called an assignee or trustee or any other name, and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person, with all its advantages and all its burdens. The working out of the view taken by the learned Judges would lead to curious results. After all, in a custom of pre-emption there is, so to speak, a debtor and creditor side the debtor side is the obligation of the holder of the share to offer it to a co-sharer; the creditor side is the right of the co-sharer to buy. The property, if fettered, would be presumably somewhat less valuable than if it were free. But if the view of the learned Judges were right, the bankruptcy of *A* would have the double effect of forfeiting something belonging to *B* and of rendering the property of *A* more valuable in the hands of his Official Assignee than it was in his own.

It was pointed out that a sale in execution of a decree transferred the property free from a claim of pre-emption .The reason is simple The Code of Civil Procedure arranging for sale under a decree mentions and deals with rights of pre-emption and gives those who hold them certain rights. Now whenever a statute deals with certain rights it is easy to conclude that it deals with the total ambit of those rights and leaves nothing standing outside the provisions of the statute. An illustration of this doctrine may be found in the case of *Attorney-General* v. *De Keyser's Royal Hotel* (1) As an illustration of how there is no privilege of person may be taken the case of *Collector of Futtehpore* v. *Syud Yad Ali* (2), where the Government as standing in right of a convict had to submit to the right of pre-emption. Just, therefore,

(1) (1920) A C , 508 (2) (1866) 1 N-W P H C R , 93

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as if the conveyance had been made to an individual, that individual would have had at once the disadvantage and the privilege of the custom of pre-emption, so the Official Assignee was in the same position and could only sell what he got

Their Lordships will, therefore, humbly recommend His Majesty that the appeal should be allowed and the judgement of the Subordinate Judge restored, the appellant to have his costs before this Board and in the court below.

Solicitors for appellant *Douglas Grant* and *Dold*.

Solicitor for respondent · *H. S L. Polak*

MISCELLANEOUS CIVIL.

Before Mr. Justice Mukerji

1926 November, 18

ALLAHABAD UNION BANK, LTD *v* JAGESHAR PRASAD SHUKUL *

Company—Liquidation—Banker and customer—Question whether in certain circumstances a customer should rank as a secured or an unsecured creditor.

One *JP* left some money with a bank and received a pass-book in which it was stated that the money was left on deposit As a matter of fact, however, the practice was this: *JP* used to secure borrowers who would agree to pledge ornaments by way of security The borrower was taken by *JP* to the manager of the bank or he would go to the manager with a note from *JP*. The ornaments were kept by the bank by way of security and money was advanced on interest at the rate of 12 per cent per annum. Out of this interest *JP* used to get 9 per cent and the bank 3 per cent No money belonging to *JP* used to be lent by the bank except on security of ornaments. Similarly, when a man came to redeem his ornaments, he would either take *JP*

* Miscellaneous Case No 340 of 1924

to the bank or take a note from him to the manager, and on payment the ornaments would be returned.

Held, that, in these circumstances, the bank having gone into liquidation, *JP* should rank as a secured creditor

THIS was a matter arising out of the liquidation of the Allahabad Union Bank, Ltd., the question at issue being whether one Jageshar Prasad Shukul should in certain circumstances rank as a secured creditor or only as an ordinary creditor. The facts upon which the decision of the Court depends are fully set forth in the judgement.

Babu *Harendra Krishna Mukerji* (liquidator) appeared in person for the bank.

MUKERJI, J.:—Mr. Jageshar Prasad Shukul states that the nature of the transaction between him and the bank was like this. Mr Jageshar Prasad having some money to spare for investing in loans, he handed over the money to the Union Bank and received a note-book in which it was stated that the money was for safe custody As a matter of agreement and practice, however, Mr. Jageshar Prasad used to secure borrowers who would agree to pledge ornaments by way of security The borrower was taken by Mr. Jageshar Prasad to the manager of the bank or he would go to the manager of the bank with a note from Mr. Jageshar Prasad. The ornament was kept by the Bank by way of security and money was advanced on an interest of 12 per cent. per annum Out of this interest Jageshar Prasad used to get 9 per cent. and the bank 3 per cent No money of Jageshar Prasad used to be lent out by the bank without any security of ornaments Similarly, when a man came to redeem his ornaments, he would either take Jageshar Prasad to the bank or take a note of his to the manager of the bank and on payment the ornament would be released.

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Mr Harendra Krishna Mukerji, official liquidator, states that this is a correct representation of the transaction. Mr. Jageshar Prasad and Mr. Mukerji are also agreed that in the pass-book given to Mr Shukul the book numbers of transactions by which money was lent on security of ornaments used to be noted and afterwards a slip of paper used to be given to Mr. Jageshar Prasad on which were entered the particulars of the transactions of the loans entered into on his behalf by the bank.

The question under the circumstances is whether Mr Shukul is to be treated as a secured creditor or whether he should rank as an ordinary creditor of the bank

No counsel appears for Jageshar Prasad and I have heard Mr Harendra Krishna Mukerji on behalf of the bank.

In my opinion Mr. Shukul is in the position of a secured creditor The reasons are these. His money was not at the disposal of the bank like that of any other customer Jageshar Prasad's money was always secured on a pledge of ornaments and the transactions were all entered into with the consent and approval of Mr Shukul. It is true that the ornaments over which the money of Mr. Shukul was secured did not belong to the bank But if we look into the spirit of the transaction we see that Jageshar Prasad had the security of ornaments and he could never lose his money so long as the ornaments were available It is common ground that Kedar Nath eventually disposed of the ornaments in a way detrimental to the interest of Mr Shukul but that does not make any difference in principle. Kedar's act was in breach of confidence.

Holding as I do that Mr Jageshar Prasad is a secured creditor, I direct that he shall rank as such

No counsel is appearing and, therefore, there is no order as to costs.

APPELLATE CIVIL.

Before Mr Justice Mukerji and Mr Justice Ashworth

SHIBBI (PLAINTIFF) *v* HARDHIAN SINGH (DEFENDANT.)*

1926 November, 23

Civil Procedure Code, section 47; order XXI, rule 100—Suit on mortgage—Party defendant exempted—Purchase of property by plaintiff after decree—Remedy of exempted defendant who claims title to the property.

S obtained a decree for declaration of title to, and possession of, certain property against *R* and executed it. *R* subsequently mortgaged half of the property to *H*, who brought a suit for sale on his mortgage, impleading *S* as a defendant. *S* pleaded that the property in suit belonged to her when the plaintiff's mortgage was executed. The court exempted *S* from the suit, and gave the plaintiff a decree against *R*. Delivery of possession was made by the court amin, and *H* obtained mutation of names. *S* then applied for possession under order XXI, rule 100, of the Code of Civil Procedure, but her application was disallowed. She then brought a regular suit claiming either a declaration of title or possession.

Held, that section 47 of the Code of Civil Procedure was no bar to the suit. *Data Din* v. *Nanhu* (1), distinguished.

THIS was a second appeal arising out of a suit brought by the plaintiff appellant for a declaration that she was entitled to certain property. There was an alternative prayer that in the event of it being found that she had lost possession of the property the decree should be one for possession. The owner of the property was originally one Ramjas. The plaintiff, Musammat Shibbi, brought a suit for possession

* Second Appeal No. 324 of 1924, from a decree of Jwala Sarup, Additional Subordinate Judge of Saharanpur, dated the 14th of February, 1924, reversing a decree of Sheonarain Mohtra, Munsif of Deoband, dated the 15th of May, 1923.

(1) (1913) 16 A.L.J., 752.

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against him and obtained a decree on the 8th of May, 1915 The decree was executed and the plaintiff obtained possession on the 27th of September, 1915 Subsequent to this Ramjas executed a simple mortgage bond in favour of Hardhian Singh, the defendant respondent, in respect of half the property Hardhian Singh brought a suit on the basis of this mortgage against Ramjas and therein impleaded Musammat Shibbi, the plaintiff Musammat Shibbi pleaded that the property belonged to her when Ramjas executed the mortgage bond in favour of Hardhian Singh. The court found that this was correct; but in view of the fact that there was an earlier mortgage bond executed in favour of Hardhian Singh by Ramjas, it refrained from dismissing the suit against Musammat Shibbi. It held, however, that on the present mortgage bond no claim could be maintained against Musammat Shibbi It accordingly exempted Musammat Shibbi as a party and gave her costs, but gave the defendant against Ramjas a decree for sale, in execution of which he got sold and himself purchased the whole property. Delivery of the property was given by the court amin. In consequence of this delivery of the property Hardhian Singh obtained mutation of names Thereupon Musammat Shibbi applied under order XXI, rule 100, of the Code of Civil Procedure, for restoration of the property on the ground that she had been dispossessed by Hardhian Singh in execution proceedings following the decree obtained by the latter against Ramjas. This application was rejected by the court on the ground that the amin's delivery of possession of the property had merely been symbolical and had not, in fact, caused Musammat Shibbi to lose possession of the property which had been hers up to the time of delivery by the amin. The defendant, however, still continued to

assert his possession or at any rate his right to possession, and Musammat Shibbi accordingly brought the present suit. The first court decreed it, and finding that the plaintiff was, at the time of filing the suit, actually out of possession it gave not merely a declaration but a decree for possession. The lower appellate court held that the suit was barred by section 47, inasmuch as the question between Musammat Shibbi, plaintiff, and the defendant was a question arising between the parties to the mortgage suit brought by the defendant and that in consequence the question should have been settled in the execution proceedings and no suit could be brought.

The plaintiff appealed.

Mr *Nihal Chand*, for the appellant.

Mr. *Akhtar Husain Khan*, for the respondent.

The judgement of ASHWORTH, J., after stating the facts as above, thus continued :—

It is to be noted that Musammat Shibbi's application under rule 100 was based on her allegation that she had actually lost possession in execution proceedings. The execution court then dismissed her application on the ground that she had not lost possession Her present plea is an alternative one. Either she is still in possession and is entitled to a declaration or she has lost possession subsequent to the order of the execution court dismissing her application under rule 100 on the ground that she was still in possession In my opinion the present question is not one that related to the execution, discharge or satisfaction of the decree obtained by Hardhian Singh in the mortgage suit and consequently section 47 will be no bar even if we consider that the order of the court exempting the plaintiff was in effect an order dismissing the suit against her.

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Ashworth, J

The decision of a two-Judge Bench of this Court, *Duta Din* v. *Nanku* (1), has been cited to us as authority for holding that where in a previous suit a remedy has been denied to a plaintiff as against one defendant, by reason of the exemption of the latter or the dismissal of the suit against the latter, the plaintiff is barred by section 47 of the Code of Civil Procedure from bringing a fresh suit against the same defendant to obtain the remedy The decision referred to, though in my opinion a correct decision, does not appear to me to be authority for this proposition It was not held that a defendant exempted is a person against whom a suit is dismissed, but merely that the Judge had misused the term "exempted" in that particular decree Again, in that case the plaintiff, after getting a decree and failing to execute it entirely by sale of the father's interest in the joint family property, applied to execute it against the sons (who had been exempted in the suit) for the balance. His application was rejected in the execution department. He then brought a suit for a *declaration* that he was entitled so to execute it. His application was held barred by section 47 of the Code and I think rightly so. It was not held that a second suit to *obtain a new decree*, like the present one, could be so barred. Obviously, in the circumstances of the case cited, such a second suit would have been barred by section 11, but it would not have been barred by section 47

For the above reasons I would allow the appeal with costs.

MUKERJI, J. [after stating the facts] :—

I am clearly of opinion that the suit is not barred by the provisions of section 47 of the Code of Civil Procedure. I am prepared to concede without deciding the point that the exemption of the present plaintiff

(1) (1916) 16 A L J , 752

from the suit of 1917 was tantamount to the dismissal of the suit as against her. But it is clear to me that the question now raised is not a question contemplated by section 47 of the Code of Civil Procedure Section 47 does not apply to all sorts of questions that may arise between people who had once been parties to a decree. It applies only to questions that arise " relating to the execution, discharge or satisfaction of the decree," to which the litigants are parties. Now let us consider what was the decree that was passed in the suit of 1917 It was to the effect that the property was to be sold so far as Ramjas was concerned, the suit was to be dismissed and Musammat Shibbi was to get her costs So far, therefore, as Musammat Shibbi was concerned with the decree it related only to a denial of relief to the plaintiff Hardhian Singh and an award of costs of Musammat Shibbi Musammat Shibbi is not attempting to recover the costs by the present suit. She wants a decision on the question of title that was left open in the suit of 1917. That question must be decided. But it cannot be decided in the execution of the decree, the nature and the scope of which I have already described

Mukerji, J.

The case of *Data Din* v *Nanku* (1) has been cited before us as an authority for the proposition that the present question must be decided in the execution department. The facts of the case were briefly these A mortgagor who had obtained a mortgage from a father of a joint Hindu family brought a suit against the executant of the mortgage and his sons for recovery of the money lent by sale of the property. The sons claimed that there was no legal necessity for the loan and urged that they were not liable to pay. In the result the sons were " exempted " and a simple money decree was passed against

(1) (1918) 16 A L J , 752.

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Mukerji, J.

the father in his personal capacity. After the decree-holder had exhausted his remedy against the father, that is to say, sold the share of the father in the family property in execution of the decree, he sought to realize by execution the balance of the decree from the sons on the ground that the sons were liable to pay the balance on account of their pious obligation to pay their father's debt. The sons successfully objected, and then a suit was filed against them to obtain a declaration that they were liable under the *decree already passed*, and their property was liable to be taken in execution. Two learned Judges of this Court held that the question must be decided in the execution department and, therefore, the suit was dismissed. The question could be litigated only in the execution department. The question that was raised was not alleged to be based on a fresh cause of action and it had everything to do with the decree that was already passed. The case of the decree-holder was that there was a balance of debt left and the sons were bound to pay that. Further, it was his case that he could execute the old decree itself against the sons, because of their pious obligation. The suit was barred not only by section 47 of the Code of Civil Procedure but also by section 11 of the same Code. If the sons were liable to pay their father's debt on account of their pious obligation that was a plea which might and ought to have been taken by the plaintiff in the very suit which failed against the sons. This case has, therefore, no application.

The case of *Krishnappa Mudaly* v. *Periaswamy Mudaly* (1), lays down that "where a party to a mortgage suit who sets up a title adverse to both the mortgagor and the mortgagee has been exonerated from the suit on the ground of misjoinder and his claim has not

(1) (1916) I.L.R., 40 Mad., 964

been adjudicated upon in the suit, he does not remain a party to the suit for the purposes of section 47 of the Code of Civil Procedure and his claim petition in respect of properties delivered in execution of the decree to the decree-holder falls under order XXI, rule 100, of the Code" This ruling is relied upon by the learned counsel for the appellant. Although partially the principle of the ruling would support the appellant's case it is not necessary to discuss it because it is not on all fours with the case before us.

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For reasons given above I would allow the appeal, set aside the decree of the court below and remand the appeal to the lower appellate court for disposal on the merits

BY THE COURT —We allow the appeal, set aside the decree of the lower appellate court under order XLI, rule 23, of the Code of Civil Procedure and remand the case to it for disposal on the merits. Costs here and hitherto will abide the result.

Appeal allowed.

Before Mr Justice Lindsay and Mr Justice Sulaiman.

AHMAD HAKIM (PLAINTIFF) v. MUHAMMAD HIKMATULLAH AND OTHERS (DEFENDANTS) *

1928

December, 2.

Muhammadan law—Pre-emption—First demand followed promptly by a second, in presence of witnesses and vendees, but witnesses not asked to bear testimony—Demand held valid

In a suit for pre-emption, under the Muhammadan law, the plaintiff made the first demand, as required by law, in the presence of two witnesses, and asked them to accompany him to the vendees in order that the second demand might be made in their presence They both stated that they heard the second demand being made and their attention was attracted to it.

* Second Appeal No 1123 of 1925, from a decree of Ganga Nath, First Subordinate Judge of Moradabad, dated the 24th of February, 1925, reversing a decree of Riaz-ud-din Ahmad, Munsif of Amroha, dated the 29th of August, 1924.

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Held, that the omission on the part of the plaintiff to ask the witnesses in express terms to bear testimony was not fatal *Ganga Prasad* v. *Ajudhia Prasad* (1) and *Sadiq Ali* v *Abdul Baqi Khan* (2), distinguished.

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Sarkar Bahadur Johari*, for the appellant.

Mr *Muhammad Husain*, for the respondents.

LINDSAY and SULAIMAN, JJ —This is a plaintiff's appeal arising out of a suit for pre-emption under the Muhammadan law There were two rival suits, one of which stands dismissed and has not come up before us. We are here concerned with the suit brought by the plaintiff Hakim-ullah. The court of first instance believed the plaintiff's evidence which was to the effect that as soon as he heard of the sale he shouted out "I am the pre-emptor and I demand pre-emption." After that he took two witnesses, Muhammad Ibrahim and Munshi Farh t-ullah, who were present at the time when he made the first demand, to the diwan-khana of the vendees, and addressing all the vendees he made a second demand in the following words :—

"I am the pre-emptor, and I demand pre-emption from all of you. As soon as I heard of the sale, there and then I fulfilled the condition of pre-emption After deducting the price of the materials which you have realized I would pay the price in full. Please take it from me and execute a sale-deed."

The learned Munsif held that the plaintiff had, in making his second demand, referred to the first demand, and that inasmuch as he had taken the witnesses with him it was not necessary for him specifically to ask them to bear testimony

(1) (1905) I L R , 28 All., 24. (2) (1922) I L R , 45 All , 290.

The lower appellate court has come to a contrary conclusion. Relying on the case of *Ganga Prasad* v. *Ajudhia Prasad* (1), it has held that the omission of the plaintiff to invoke the witnesses is fatal. In our opinion this view was not correct. In the case relied upon by the lower appellate court the plaintiff had neither taken the witnesses with him to the spot nor had he asked them to be witnesses to the demand These persons simply happened to be present at the time when he made the second demand. It was, therefore, held that the second demand was invalid. In the present case the plaintiff had actually made the first demand in the presence of the witnesses and had asked them to accompany him to the vendees in order that a second demand might be made in their presence They both stated that they heard the second demand being made and their attention was attracted to it. The mere omission to ask them in express terms to bear testimony would, therefore, not be fatal.

The learned counsel for the respondents relies on the case of *Sadiq Ali* v *Abdul Baqi Khan* (2). That case, however, is clearly distinguishable, inasmuch as there the main point considered was that in making the second demand no reference whatsoever had been made to the first demand All the authorities quoted in the judgement referred to cases where at the time the second demand was made no reference whatsoever was made to the first demand A mention of the first demand is necessary in order to inform the vendee that it was promptly made as required by law. That is not so in the present case, for here a reference to the first demand was in fact made

Only two points were raised before the lower appellate court; one was the question of law which we

(1) (1905) I L R , 28 All., 24 (2) (1922) I L R , 45 All , 290

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have just disposed of and the other was the question of the amount of the sale consideration which has not been decided by that court We accordingly allow this appeal and set aside the decree of the lower appellate court but before passing a final decree we call for a finding on the question of the consideration under order XLI, rule 25, of the Code of Civil Procedure.

Appeal allowed

REVISIONAL CIVIL.

Before Mr Justice Lindsay

1926 December, 3

SALIK RAM (PLAINTIFF) v WALI AHMAD (DEFENDANT).*

Act No X of 1873 (Indian Oaths Act), sections 9 to 11—Party agreeing to be bound by the statement of a particular witness—Circumstances in which party may be allowed to resile from agreement

A party who has agreed, in accordance with the provisions of the Indian Oaths Act, 1873, to be bound by the statement on oath of a particular person is not in all circumstances irrevocably bound by such agreement If such party satisfies the court that there is good ground for retracting, the court would probably exercise a wise discretion in refusing to administer the oath, but when a party puts forward frivolous reasons for retracting, the court is justified in administering the oath notwithstanding the retraction *Thoyi Ammal v Subbaroya Mudali* (1), followed

THE facts of this case, so far as they are necessary for the purposes of this report appear from the judgement of the Court.

Munshi *Bhagwati Shankar*, for the applicant.

The opposite party was not represented

* Civil Revision No 141 of 1926.
(1) (1899) I L R, 22 Mad, 231

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SALIK RAM v. WALI AHMAD

LINDSAY, J. :—This is an application in revision against an order of a Judge of the Small Cause Court. It appears that the plaintiff applicant brought a suit on a bond against the defendant opposite party On the 16th of April, 1926, both parties joined in making a petition to the Judge in which they stated that they were willing to be bound by the oath of one Nazir-ud-din It was stated in the petition that Nazir-ud-din was present in court but for some reason or other, which does not appear, Nazir-ud-din was not examined on that day. The court ordered the 30th of April to be fixed for taking the evidence of Nazir-ud-din. The witness was not served for that date and was summoned again for the 14th of May. On that date Nazir-ud-din was examined He deposed against the plaintiff and the suit was dismissed.

In this application for revision it is stated that prior to the date on which Nazir-ud-din was examined the plaintiff had expressed his desire to resile from the petition of the 16th of April, 1926 I find that on the 20th of April the plaintiff put in an application saying that he was no longer willing to be bound by the oath of Nazir-ud-din, as he had come to know that Nazir-ud-din was a close friend of the defendant On this the Judge recorded an order saying that the plaintiff was not entitled to resile from the agreement to refer. Another application was presented by the plaintiff on the 8th of May in which he reiterated the same prayer This too was refused by the court for the same reason.

I do not think it was correct for the court below to hold that the plaintiff could not resile from the agreement to refer. The law on the subject has been explained in a judgement of the Madras High Court

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to be found in *Thoyi Ammal* v. *Subbaroya Mudali* (1). At pages 236 and 237 of the report their Lordships observe:—

"There is nothing in sections 9 to 11 of the Act (Indian Oaths Act) which allows a party to retract after the opponent has accepted the proposal The Act gives the court a discretion to administer the oath or not, and if a party, after agreeing to an oath, satisfies the court that there is good ground for retracting, the court would probably exercise a wise discretion in refusing to administer the oath, but when a party puts forward frivolous reasons for retracting, we think the court is justified in administering the oath notwithstanding the retraction. This has been expressly decided in *Ram Narain Singh* v *Babu Singh* (2) and *Abaji* v *Bala* (3), and there is nothing in the case of *Vasudeva Shambog* v *Narama Pai* (4), to support the contrary view"

Having regard to what is stated in the case just cited and also to what is stated in the report of the case of *Ram Narain Singh* v. *Babu Singh* (2), I think the proper course for the court below was to examine the grounds upon which the plaintiff desired to withdraw from the reference and to satisfy itself whether the reasons given for the desire to withdraw were satisfactory or not.

I accept this application, set aside the decree of the court below and send the case back for investigation on the lines indicated If the Judge is satisfied that the plaintiff has good reasons for withdrawing from the reference he will refuse to administer the oath to the referee. On the other hand, if he is satisfied that the grounds set out by the plaintiff for withdrawal are not good grounds he will re-examine the referee and decide the case in accordance with his statement.

As the application is not opposed here I make no order as to costs

Application allowed

(1) (1899) I L R, 22 Mad, 234
(2) (1893) I L R, 16 All, 46
(3) (1896) I L R, 22 Bom, 261
(4) (1879) I L R, 2 Mad, 356

APPELLATE CIVIL.

Before Mr Justice Ashworth and Mr. Justice Pullan.

MUHAMMAD SHAFI (DEFENDANT) *v* MUHAMMAD ABDUL AZIZ AND OTHERS (PLAINTIFFS)* 1926 December, 14

Muhammadan law—Waqf—Waqf *created in favour of mosque* —*Interest reserved to* waqifs *during their lifetime*

Two Muhammadans (husband and wife) of the Hanafi sect made a *waqf* of a house in favour of a mosque which was managed by *panches*. In doing so, however, they reserved to themselves the right to live in the house until the death of the survivor.

Held that, according to the Muhammadan law, the *waqf* was invalid.

Muhammad Aziz-ud-din Ahmad Khan v *The Legal Remembrancer to Government, North-Western Provinces and Oudh* (1), followed *Abdul Kadir* v *Salima* (2), and *Bikani Mia* v *Sukh Lal Poddar* (3), referred to

THE facts of this case were as follows:—

On the 28th of May, 1912, two Muhammadans (husband and wife) belonging to the Hanafi sect made a *waqf* of a house in favour of a certain mosque under the management of *panches*, but it was provided by the *waqf-namah* that the executants were to keep their residence in the house until their death, and that after their death the *panches* were to have a right to manage the property and spend its income on the mosque. The wife died first, and thereafter the husband left the house. The *panches* then sued for possession of the house. The court of first instance dismissed the suit on the ground that the *waqf* was invalid under the Muhammadan law. But on appeal

* Second Appeal No. 873 of 1924, from a decree of E. Bennet, District Judge of Agra, dated the 21st of February, 1924, reversing a decree of Alakh Murari, Munsif of Agra, dated the 4th of August, 1923.

(1) (1893) I L R., 15 All., 321. (2) (1886) I L R., 8 All., 149.
(3) (1892) I L R., 20 Calc., 116.

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the District Judge reversed this decree and decreed the suit. The defendant appealed to the High Court.

Maulvi *Mushtaq Ahmad*, for the appellant.

Maulvi *Mukhtar Ahmad*, for the respondents.

The judgement of PULLAN, J., after a brief recital of the facts of the case, continued as follows:—

In commenting on the terms of the deed the learned District Judge states:—

> "It will be observed that the *waqf* was to take effect at once and the property became invested in the trustees at once, but the executants reserved a right of enjoyment during their lifetime."

It does not appear to me that this is a correct interpretation of the document. The learned Judge has himself agreed that the authority of Imam Muhammad is to be preferred to that of Imam Abu Yusuf. This is the view taken by this High Court in the case of *Muhammad Aziz-ud-din Ahmad* v *Legal Remembrancer to Government, North-Western Provinces and Oudh* (1). Abu Yusuf makes simple declaration sufficient to create a valid *waqf*, but Imam Muhammad requires that the *waqif* should divest himself of possession. In the present case it is certain that the *waqif* did not divest himself of possession at once, though he subsequently, after his wife's death, left the house in order to take up service. Nor did he appoint himself *mutawalli* to manage the property in the interest of the mosque. Thus the learned Judge was compelled to fall back upon his second position that the *waqf* was rendered complete when possession was transferred or abandoned by Amir ud-din, and the plaintiffs began to realize rent on the property.

(1) (1893) I.L.R., 15 All., 321

I agree with the lower courts that the authority of Imam Muhammad should be preferred generally to that of Abu Yusuf, and do not find that the Full Bench ruling of the Allahabad High Court reported in *Abdul Kadir* v. *Salima* (1), lays down anything to the contrary. The proposition there enunciated was that whenever the opinion of Abu Yusuf is supported by either Abu Hanifa or Imam Muhammad, that opinion should be accepted, not that the opinion of one should be preferred to that of the others.

Pullan, J

In my opinion there are two points which are fatal to the acceptance of the deed in suit as being a valid and complete *waqf*. In the first place, it is of the nature of a testamentary *waqf* which would only come into effect on the death of the *waqif*, and Amir-ud din is still alive. I am not of opinion that the removal of Amir-ud-din from the house accelerated the operation of the deed and is equivalent to his death. In the second place, the deed is a *waqf* in favour of a mosque in which the *waqif* has reserved to himself a benefit: in fact he has stayed the operation of the *waqf* so that he may have full enjoyment of the property during his lifetime. It is true that the Musalman Waqf Validating Act (IV of 1913) accepts the opinion of Abu Yusuf that the *waqif* may derive personal benefit from a *waqf*, against the opinion of the other authorities, but this is not the case when the *waqf* is created for the benefit of a mosque. On this point the Muhammadan lawyers are unanimous (Tyabji's Principles of Muhammadan Law, section 515.)

For these reasons I would hold that the deed executed was in substance a testamentary *waqf* which could not come into operation until the death of the

(1) (1886) I. L. R., 8 All. 149

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waqif and that it was invalid as such because the *waqf* being in the name of a mosque, the *waqif* reserved a benefit to himself.

ASHWORTH, J :—I concur with the finding on the ground that according to Imam Muhammad actual delivery of the *waqf* property to the *mutawalli* is a condition precedent of the *waqf* taking effect and on the ground that we have been shown no decision of this Court which dissents from the view expressed in *Muhammad Aziz-ud-din Ahmad Khan* v. *The Legal Remembrancer to Government, North-Western Provinces and Oudh* (1), that the authority of Abu Yusuf is to be postponed to that of Imam Muhammad. This decision purports to follow a Full Bench decision of the Calcutta High Court in *Bikani Mia* v. *Sukh Lal Poddar* (2) I have examined that decision of the Calcutta High Court, but cannot find that it expressly states that Imam Muhammad is to be preferred to Abu Yusuf, but indirectly this decision appears to have followed Imam Muhammad and there have been other decisions apparently preferring the authority of Imam Muhammad, even though they do not expressly state that he is a superior authority for this province to Abu Yusuf. The case has not been argued before us in a manner which would, I think, justify a refusal to follow the decision in 15 Allahabad or would justify our putting the matter up before a Full Bench of this Court

If, however, the question were *res integra* the contrary opinion of Mr. Amir Ali would require to be given due weight. In his Students' Handbook on Muhammadan Law, 1925, which is later than the last published edition of his larger edition of Muhammadan Law, he expresses, on page 158, the opinion

(1) (1893) I L R , 15 All , 321 (323) (2) (1892) I L R , 20 Calc , 116.

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that Imam Muhammad's view is not recognized among the Hanafis of India, and this is the view which he expressed in his dissentient judgement in the case referred to in 20 Calcutta.

I am not disposed to concur with my brother PULLAN in the view that the *waqf* deed should be construed as a testamentary deed, that is to say, as postponing all effect of the dedication until the *waqif's* death As I read the deed, it came into effect at once, although the persons nominated as managers were not to exercise management until after the testator's death and the executants were to reside in the house until their death If the deed were testamentary, it should have expressed that the deed of dedication (and not merely the direction as to management) was not to take effect until the *waqif's* death, and, again, if it were testamentary, there would be no need to reserve to the *waqif* a right of residence in the house until his death

Ashworth, J.

Nor again do I find sufficient authority for the statement that there can be no reservation when the *waqf* is in favour of a mosque It is true that Tyabji, on page 640 of his Muhammadan Law, 2nd edition, states that even according to Yusuf Ali when a mosque is the object of the "*waqf*" the *waqif* cannot be a beneficiary. But in the light of Amir Ali's Students' Muhammadan Law (referred to above) I take this to mean that the *waqif* cannot be a beneficiary where some one else is appointed manager from the date of the *waqf* For on page 156 of this handbook, paragraph 41, Amir Ali (who considers Abu Yusuf supreme authority in India and Imam Muhammad no authority therein, see page 158, note) says:—"Under the Hanafi law, a *waqif* may constitute himself the first beneficiary of the trust, and

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if he does so he can lawfully reserve the benefit for himself or partially." He makes no distinction in the case of a building dedicated as a mosque, and *a fortiori* no distinction in the case of a building dedicated to, and not for, a mosque, as is the case in the present suit. The deed I construe to be one where no curator has been appointed to function during the lifetime of the *waqif* and, consequently, the office could appertain to the *waqif quâ waqif;* and he could reserve the use to himself

On the sole ground, therefore, that I am not prepared to dissent from the decision of two Judges of this Court in 15 Allahabad to the effect that Imam Muhammad is to be preferred as an authority to Abu Yusuf, I concur in the order of my learned brother and would allow this appeal.

BY THE COURT.—The order of the Court is that this appeal is allowed with costs throughout and the decree of the court of first instance restored

Appeal allowed

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Banerji

1926 December, 15.

RAM CHANDRA BANSAL AND ANOTHER (APPLICANTS) *v.* LALMAN AND OTHERS (OPPOSITE PARTIES) *

Civil Procedure Code, section 2(2)—Preliminary decree, passed ex parte—Notice to other side necessary before final decree

Where the preliminary decree in a suit has been passed *ex parte*, notice ought to be issued to the other side before the final decree is passed

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

Babu *Satish Chandra Das*, for the appellants.

*First Appeal No 35 of 1925, from an order of Shamsuddin Khan, Subordinate Judge of Jhansi, dated the 4th of January, 1926.

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RAM CHANDRA BANSAL v. LALMAN.

Munshi *Girdhari Lal Agarwala*, for the respondents

WALSH, A. C. J., and BANERJI, J.:—In our opinion this appeal must be allowed. Circumstances alter cases. We are not attempting to lay down an invariable rule that in every case where there is a preliminary decree, notice ought to be issued to the other side before the final decree is passed. But in a case where the other side is absent and the preliminary decree is *ex parte*, we do lay down the rule. It appears that there is nothing in the Code especially dealing with the matter where, in a case like partnership or a similar matter, where the liability to pay a sum of money depends on the decision of a preliminary point, for example, the existence of the partnership, the issue to be decided in the preliminary decree is quite different from the issue to be decided in the final decree. If the preliminary decree is in favour of the claimant and accounts have to be adjusted, then it is quite clear that the matter takes an entirely different aspect and complexion, and that the person whom it is sought to make liable is just as entitled to notice of the judicial proceeding which is to settle the question of the amount as he is in an ordinary suit. There is nothing in the rules enabling the court to decide *ex parte* without further notice which is inconsistent with this rule, and on that ground we are bound to hold that the commissioner had no jurisdiction at all to find the amount without having issued previous notice to the defendant. We must allow the appeal, set aside the final decree and direct the court below to carry out the order appertaining to accounts according to law, after due notice to both parties.

Appeal allowed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Ashworth.

1926 December, 17

BHAGWAN PURI AND OTHERS (DEFENDANTS) *v* SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF).*

Act No. VII of 1870 (*Court Fees Act*), *section* 7, *clause* (v) (c) —*Court fee—Suit for possession of land not paying revenue—Suit overvalued by plaintiff—Defendant not debarred from filing an appeal on a correct valuation*

Where a plaintiff in a suit for possession overvalues the property claimed and the suit is decided by a higher forum than that by which it would otherwise have been tried, and is decreed, the defendant appellant can, nevertheless, confine the court fee on his appeal to the amount required by the valuation of the subject-matter according to law. He is not estopped by having had the advantage of the original suit being tried by a higher forum An appellant, if he has paid a sufficient court fee, is not bound by his incorrect statement of value He may be allowed to correct it

THIS was a reference under section 5 of the Court Fees Act 1870. The Taxing Officer's report was as follows :—

This appeal arises out of a suit by the plaintiff for recovery of some plots of land, which he has valued at Rs. 3,00,000.

The suit was decreed by the lower court and the defendants have preferred this appeal at the same valuation. The court fee paid by the plaintiff was *ad valorem* and amounted to Rs. 2,425. This, it is held by the Stamp Reporter, is the correct fee, while that paid by the appellants in this Court, Rs 1,425, is deficient by Rs. 1,000.

Counsel for the appellants has objected to the office report and claims that the land in suit falls

* Stamp Reference in First Appeal No 139 of 1923

under the classification of section 7, clause (v) (*c*) of the Court Fees Act

The land in suit consists of plots within the municipal limits of the Hardwar Union. According to paragraph 2 of the plaint the said Board, without the authority of Government, had been accepting rent at Rs 40 per mensem for about twelve years previous to the institution of the suit from the Juna Akhara, who had used the land for an enclosure for the huts of mahants and pilgrims. The land pays no revenue and the plaintiff (the Secretary of State) disregarding the rent taken for its use, valued it for purposes of jurisdiction and court fee, presumably at its market value, Rs. 3,00,000, as if it fell within the classification of section 7, clause (v) (*c*).

On behalf of the appellants it is contended that this valuation was wrong and should have been based on the " nett profits " that had arisen from the land, i e , Rs 40 per mensem, amounting to Rs 7,200 (fifteen times those profits) and that the court fee should have been Rs 365

Of the right of the plaintiff to put his own valuation on the suit and to pay the necessary court fee to entitle him to bring that suit before the highest forum available there can be little doubt It is to be decided whether the defendants appellants, who availed themselves of that forum without making any objection to the valuation, can in appeal object that the valuation was too high and demand to pay a lower fee. It is to be noted that, until objection was raised in this office, the original valuation of Rs 3,00,000 was accepted, though a deficient court fee was paid

I consider that the case should be laid before the Hon'ble Taxing Judge for decision of the issue raised

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above and also for decision whether, if the lower valuation is accepted for the appeal in this Court, the defendants appellants may be permitted at this stage to correct their valuation in the memorandum of appeal

Dr. *Surendra Nath Sen* and Pandit *Narmadeshwar Prasad Upadhya*, for the appellants.

Mr. *G. W. Dillon*, for the respondent.

ASHWORTH, J. —The question referred to me by the Taxing Officer under section 5 of the Court Fees Act, 1870, is as follows. The Secretary of State brought a suit for possession of certain land against the defendants appellants. The plaint was valued for court fee according to the estimated market value of land, i.e., Rs 3,00,000. The suit was decreed. The defendants in their appeal stated the value of the land to be Rs. 3,00,000 but paid a court fee of Rs. 1,425, instead of Rs. 2,425, which was the proper court fee on the said valuation. Before the Taxing Officer the appellants' contention was that the land not being subject to revenue should have been valued under section 7 (v) at fifteen times the net profit arising from the land during the year next before the date of presenting the plaint and not according to the market value, and that the plaintiff had paid an excessive court fee. The Taxing Officer, while apparently admitting that the appellant is correct as to the valuation required by law, has stated that the plaintiff could put his own valuation on the suit and so pay the necessary court fee to entitle him to bring that suit before the highest forum available. It seems to me, however, that the plaintiff's estimate of the value of the land, if contrary to the market value according to rule, cannot be allowed to operate to the prejudice of the defendant at any stage of the suit.

It appears plain, therefore, to me that the defendant can object to the valuation since it is now in his interest to do so.

2 It is, however, suggested by the Taxing Officer that the defendants appellants are estopped from objecting to that valuation because they availed themselves of the highest forum when the original suit was tried I know of no rule of law that would create such an estoppel, and it is difficult to hold that the decision of the suit *against* them by a higher forum was any advantage to them I hold that the defendants appellants were entitled to stamp their appeal with a stamp based on the valuation of the land arrived at by correct application of the rule

3 Another question, however, arises The defendants appellants in their petition of appeal stated that the value of the appeal was Rs. 3,00,000. Can they now be permitted to say that the value is less? I consider that they can, and for the following reasons The stated value of the appeal would not prevent their being called upon to pay a court fee on a higher valuation if that valuation were wrong. In the same way I do not see why they should not be allowed to correct their valuation when they are asked to pay a higher court fee than is due on the value correctly assessed according to law.

4. Apparently the appellants need only have paid the court fee of Rs. 365 according to the proper valuation of the land They have, in fact, paid Rs 1,425. They have not asked for any refund, and in my opinion the court fee should be accepted as sufficient.

APPELLATE CIVIL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Banerji

1926 December, 21.

BABU RAM (JUDGEMENT-DEBTOR) *v* IMAN-ULLAH (DECREE-HOLDER) *

Civil Procedure Code, order XXI, rules 69 and 90—Execution of decree—Adjournment of sale—Necessity for publication of date and hour of adjourned sale.

When a sale in execution of a decree has been adjourned it is essential that due notice of both the day and the hour of the adjourned sale shall be given to the public The hour is only of slightly less importance than the day *Mahabir Pershad* v *Dhanukdhari Singh* (1), referred to

THIS was an appeal arising out of proceedings in execution of a decree The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

Munshi *Panna Lal*, for the appellant

Munshi *Harnandan Prasad*, for the respondent

WALSH, A. C. J., and BANERJI, J :—It is unfortunate that this Court should be compelled to interfere twice after an interval of more than one year with the order of the court below, but we feel that we have no alternative in this case and that there ought to be a fresh sale. There are several unsatisfactory features about the case. First the property is valued at Rs. 1,000 in the sale proclamation. The judgement-debtors originally gave over Rs. 12,000 for it Some shops have collapsed and some buildings are obviously dilapidated. This would depreciate the value of the property very much, and the Judge in this case says : "It can hardly be worth more than half," which would be Rs. 6,000 He then goes on to say that in his opinion the property would be worth a little more

* First Appeal No 32 of 1926, from an order of Syed Iftikhar Husain, Subordinate Judge of Budaun, dated the 8th of December, 1925

(1) (1904) I L.R., 31 Calc , 815

than Rs. 3,000. This is rather a big jump from Rs 6,000, but it explains a specific finding by the Judge that the property fetched a low price and the judgement-debtors have suffered The low price was Rs 1,550, and, therefore, the figure in the sale proclamation was too low. When a fresh sale proclamation is issued, this matter ought to be carefully considered by the court below.

The next point is that the provisions of order XXI, rule 69, were ignored The rule distinctly says that the sale shall be adjourned to a specified day and hour. In the ordinary way those are the only two important things to be known, after the property has been properly advertised by a sale proclamation. It is admitted that no hour was fixed on this occasion The learned Judge says this is a thing which is hardly ever done by the courts, and elsewhere it is said "it is more honoured in the breach than in the observance." We can only say that this honoured breach must stop It is a very serious matter. The hour is only of slightly less importance than the day and ought to be clearly announced to the public, and we think it right to draw the attention of the English Judge to this matter, with a view to intimating to the courts below that this provision in the rule must be followed. The learned Judge himself attached importance in his judgement to the hour of the adjourned sale, but he attributes to proposing purchasers a knowledge that the sale would take place at the same hour. Why would-be purchasers should be supposed to know this, when the rule says that the hour is to be specified in the order of adjournment, it is difficult to follow, unless would-be purchasers must be taken to know that the subordinate courts invariably break the rules in the Code which direct them how to conduct the

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sales. But in this particular instance, if it be the fact that the would-be purchasers knew that the sale would take place at 12, there could hardly have been any body of persons in Budaun on that day who were more surprised and deluded by the difference between the actual facts and what they were supposed to know, because, although according to the learned Judge, by the practice of the courts the sale ought to take place at 12, and everybody in Budaun ought to know that it would take place at 12, the sale officer did not arrive till 3 How it happened that there were ten bidders still left at 3 o'clock for the sale, which everybody knew was going to take place at 12, is a matter which is left somewhat mysterious But the learned Judge has not had the courage of his opinions in holding that the appellant ought to have called the purchasers who were misled by the time of the sale taking place, when he himself holds that everybody ought to have known it.

Under the circumstances, closely following the direction contained in the decision of the Privy Council, to which we have been referred, namely, *Mahabir Pershad Singh* v *Dhanukdhari Singh* (1), we think that we, differing from the lower court, are bound to draw the inference that, assuming that the learned Judge is right when he says that the property fetched a low price, the real explanation of that low price is the breach of the law, and the muddle and misdirection to the proposing purchasers which was allowed to take place about the hour of the sale

Now without direct evidence, a strong clear case is required to establish the connexion between the irregularity and the inadequate price. In our opinion the circumstances in this case are strong and leave no doubt as to the proper inference which ought to be

(1) (1904) I L R , 31 Calc , 815

drawn. We are confirmed in this view by the fact that an experienced Judge, on a previous occasion, although for somewhat unusual reasons, which did not approve themselves to this Court, was satisfied that the sale was not a fair one, and ought to be set aside. We will leave the costs of this appeal to abide the result of the sale in this way, if the price fetched is more than Rs 1,550 the judgement-debtor must have his costs. If it fetches only Rs. 1,550 or a smaller price, each party must pay his own costs of this appeal.

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Appeal allowed.

Before Mr Justice Lindsay and Mr Justice Sulaiman.

MATHURA KURMI (DEFENDANT) *v* JAGDEO SINGH AND OTHERS (PLAINTIFFS) *

1926 *December*, 21

Act No. IV of 1882 *(Transfer of Property Act), section* 58(c)—*Sale—Mortgage by conditional sale—Sale accompanied by synchronous agreement for re-purchase at the end of a fixed period.*

Three documents were executed by the same parties on the same day The first purported to be a deed of sale of certain landed property comprising a good many plots of *sir* and *khudkasht* land The second was described as a deed of relinquishment, and by it the vendor proposed to relinquish all his rights in the *sir* and *khudkasht* in favour of the purchaser The third was an agreement by the purchaser by which he gave the vendor an option of re-purchasing the property which had been sold, at any time after the expiration of seven years from the date of the sale, but with this stipulation that the re-purchase was not to be made by means of funds borrowed for the purpose The three documents were registered a few days later, but all on the same day Before this transaction, also, the parties had for some time occupied the relative positions of debtor and creditor.

* First Appeal No 459 of 1923, from a decree of Piare Lal Rastogi, Additional Subordinate Judge of Basti, dated the 2nd of May, 1923

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Held, that the documents above described and the circumstances in which they were executed brought the case within the definition contained in section 58(*c*) of the Transfer of Property Act, 1882, and the plaintiff was entitled to a decree for redemption.

Narasingerp v. *Panuganti* (1), followed *Balkishen Das* v *Legge* (2), *Mohindra Man Singh* v *Maharaj Singh* (3), *Inshumbhai Nath* v *Muhammad Ubaid-ullah Khan* (4), *Muthuvelu Mudaliar* v *Vythilinga Mudaliar* (5), *Situl Purshad* v *Luchmi Purshad* (6) and *Ram Saran Lal* v *Amrita Kuar* (7), referred to

The test in such cases is the intention of the parties, which must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. *Jhanda Singh* v *Wahid-ud-din* (8), followed

ON the 22nd of May, 1915, Babu Jagdeo Singh, one of the plaintiffs in the suit, executed a sale-deed By this deed he purported to sell absolutely to the defendant Mathura Kurmi a 6 anna 3 pie share situated in a village in the Basti district named Mandila Khurd It was recited in the deed that the executant had received the entire amount of consideration from the vendee according to the details set out at the bottom of the deed, and it was declared by the executant that from the date of the execution of the deed the vendee was to take possession and to enjoy the income of the property generation after generation The deed was declared to be a deed of absolute sale.

The sum of Rs 15,000 was mentioned in the document as being the consideration for the sale This sum, with the exception of an item of Rs 242-4-0, consisted of various items constituting debts which were owing by Jagdeo Singh to Mathura Kurmi and to others.

(1) (1924) I L R , 47 Mad , 720
(2) (1899) I L R , 22 All , 149.
(3) (1922) I L R , 45 All , 72
(4) (1923) I L R , 45 All , 581.
(5) (1919) I L R , 42 Mad , 407
(6) (1883) I L R , 10 Calc , 30
(7) (1880) I L R , 3 All , 369
(8) (1916) I L R, 38 All 570

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On the same date Babu Jagdeo Singh executed a deed by which he purported to relinquish all his rights to the *sir* and *khudkasht* lands included in the 6 anna 3 pie share which had been sold.

A third deed was executed on the same date, the 22nd of May, 1915. This document was executed by Mathura Kurmi and professed to be an agreement made between Mathura Kurmi and Jagdeo Singh. It began by reciting that Jagdeo Singh had absolutely sold a 6 anna 3 pie share in Mundila Khurd to Mathura Kurmi for a sum of Rs 15,000 It went on to say that Babu Jagdeo Singh was a *rais* whose wishes Mathura Kurmi was anxious to gratify. Accordingly by this deed Mathura Kurmi declared of his own free will and accord, in order to give satisfaction to Babu Jagdeo Singh and his heirs,

> " that whenever after seven years Babu Jagdeo Singh aforesaid or his heirs out of their own funds and income actually and duly pay the whole consideration for the said sale-deed to me or to my heirs, or make a deposit of the money in our favour, then I and my heirs shall certainly return to him the whole of the sold share mentioned in the aforesaid sale-deed."

A further clause in this document provided that if Jagdeo Singh violated any of the terms of this agreement by contracting debts or by executing a registered sale-deed, a mortgage with possession or a hypothecation deed in order to raise funds to repay the sum of Rs. 15,000 to Mathura Kurmi, the agreement was to be void.

All these three documents were presented for registration on one and the same day

A suit was brought by Babu Jagdeo Singh on the 27th of July, 1922, just over seven years after the execution of the three documents just mentioned. In his plaint Babu Jagdeo Singh alleged that the three

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documents were evidence of a single transaction which he described as being a transaction of mortgage by way of conditional sale. On this footing, therefore, he claimed to be entitled to redemption on payment of the sum of Rs 15,000 Alternatively the court was asked to give a decree to Babu Jagdeo Singh even if it should be held that the transaction evidenced by these two deeds was a transaction of absolute sale with a covenant for re-purchase

Certain other persons were subsequently joined as plaintiffs in the suit, the reason for this was that in order to enable him to bring this suit for redemption or re-purchase, Babu Jagdeo Singh had to resort to raising money by means of sale and mortgage. The persons from whom he raised the money were, therefore, joined as co-plaintiffs under an order dated the 24th of October, 1923.

The defendant Mathura Kurmi took up the position that the relation between himself and Babu Jagdeo Singh was not that of mortgagee and mortgagor at all His case was that he had purchased the property in suit absolutely from Jagdeo Singh He admitted that he had, by the document of agreement, given Babu Jagdeo Singh an option to re-purchase the property. He claimed, however, that this was a totally distinct transaction from the transaction of sale and he pleaded that Babu Jagdeo Singh was not entitled now to avail himself of the option inasmuch as he had violated one of the conditions upon which the option to purchase was granted. This plea had reference to the fact that Babu Jagdeo Singh had to resort to the borrowing of money in order to enable him to make an offer of this sum of Rs 15,000 to Mathura Kurmi

Evidence, both oral and documentary, was put in before the Subordinate Judge who eventually came to the conclusion that, although these three documents

were executed as separate documents on the same day, nevertheless they were evidence of a single transaction The Subordinate Judge was of opinion that this single transaction between the parties was in reality a transaction of mortgage by way of conditional sale and not a transaction by which there had been an absolute sale with a subsequent grant of an option of re-purchase The Subordinate Judge held that if the transaction between the parties were to be held one of an absolute conveyance with an option for re-purchase the plaintiff could not succeed inasmuch as he had failed to observe the conditions upon which the option was granted. The Subordinate Judge, therefore, decreed the claim The defendant appealed

Dr *Surendra Nath Sen* and Munshi *Kamlakant Varma*, for the appellant.

Dr. *Kailas Nath Katju*, Pandit *Rama Kant Malaviya*, Dr. *Kashi Narain Malaviya* and Pandit *Debi Prasad Malaviya*, for the respondents.

The judgement of LINDSAY, J , after stating the facts as above, thus continued :—

I agree with the Subordinate Judge that, if the dealings between the parties are to be treated as a transaction of sale with a covenant for re-purchase, the plaintiffs were out of court. It is quite clear that if Mathura Kurmi was, in fact, giving the plaintiffs an option of re-purchase, the plaintiffs were strictly bound by the terms of the option and they could not ask the defendant to accept money which Jagdeo Singh had to raise by means of borrowing or by selling other property in his possession.

The question which we have to determine in this appeal is whether the Subordinate Judge was right

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Lindsay, J

in holding that, on a true construction of the documents in question and having regard to the surrounding circumstances of the case, the parties stood in the relation of mortgagor and mortgagee.

These cases occur with considerable frequency and have given rise to a good deal of discussion in the courts. We have had a strenuous and able argument advanced before us on both sides, and practically every case bearing upon the point has been cited to us, from the case of *Alderson* v. *White* (1) down to the latest case decided by their Lordships of the Privy Council, *Narasingerji* v *Panuganti* (2).

The law on the subject has been definitely laid down by their Lordships of the Privy Council in the case of *Balkishen Das* v. *Legge* (3). It was there stated that in cases of this kind what has to be determined is the intention of the parties at the time the transaction was entered into, and in order to ascertain this intention it was ruled that regard might be had to the surrounding circumstances which show how the language of the documents to be construed was related to the then existing facts. On the other hand, it was definitely ruled that no oral evidence could be given by the parties in order to show what their intention was. It is to be observed here that in the well-known case of *Alderson* v *White* oral evidence of intention was given on both sides. Their Lordships in the case of *Balkishen Das* v. *Legge* held that this could not be done, regard being had to the rule of evidence laid down in section 92 of the Indian Evidence Act.

To come now to the circumstances surrounding the transaction or transactions which took place on the 22nd of May, 1915, I have come to the conclusion that on the whole these circumstances do not afford much help in arriving at a decision as to the real

(1) (1868) 2 De Gex and J. 97.
(2) (1924) I L R., 47 Mad., 729.
(3) (1899) I L R., 22 All., 149.

intention of the parties. For the most part these circumstances are consistent with either theory, namely, that of a mortgage or of a sale. The Subordinate Judge in his judgement has referred to a number of these circumstances It appears that in the year 1914 Jagdeo Singh and Lal Bahadur Singh had executed a mortgage with possession of a share in the adjacent village of Pakri. This was a mortgage for Rs 10,000 and after this transaction had been entered into a suit was brought by one Babu Shohrat Singh for pre-emption. A copy of the plaint in this suit is to be found at page 49 of our record. Shohrat Singh claimed that under a custom of pre-emption prevailing in this village of Pakri he was entitled to have the mortgage in preference to Mathura Kurmi It was after this suit for pre-emption was instituted, and while the suit was still pending, that the sale-deed of the 22nd of May, 1915, now under consideration was executed And following on this we have the fact that by an order, dated the 4th of October, 1915, Shohrat Singh was allowed to withdraw his suit for pre-emption.

Lindsay, J.

It was argued before the Subordinate Judge that the fact that Shohrat Singh had brought this suit for pre-emption was an important factor in bringing about the transactions which happened on the 22nd of May, 1915. I agree with the Subordinate Judge that the facts that an earlier mortgage of mauza Pakri had been executed and that a suit to pre-empt that mortgage had been brought do not affect the question which we have now got to consider in any way. So far as I can judge, these facts are consistent either with the theory of a sale or of a mortgage Then again stress was laid upon the fact that the parties stood already, under the transaction above mentioned, in the relation of debtor and creditor. That again would be no reason to hold that the transaction now under consideration

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must necessarily be one which maintained that relation. It is quite open to a person who is a debtor to come to an arrangement with his creditor for the discharge of his debt by executing a deed of sale in his favour. Then again the plaintiff relied upon the fact that the stamp for the sale-deed and the stamp for the agreement were purchased on different dates. The Subordinate Judge thought that this circumstance was of no importance and I agree with him. What we are concerned with in this case is the real intention of the parties on the 22nd of May, 1915. On the other hand, the Subordinate Judge thought that there were one or two circumstances which indicated that the parties intended to make a mortgage. He referred in the document of agreement to the clause providing for deposit of the sum of Rs 15,000 It was argued that this clause had a reference to section 83 of the Transfer of Property Act Speaking for myself, I am not disposed to attach very much importance to a clause of this kind which was disregarded in one of the cases decided recently by their Lordships of the Privy Council. The Subordinate Judge, again referring to the language of the document of agreement, pointed out that the right of re-purchase was to be exercised after the expiry of seven years during which the defendant Mathura Kurmi was to hold undisturbed possession. He thought that this was an important circumstance in the case, and so far I agree with him. I shall deal with this matter a little later on in this judgement. Then the Subordinate Judge thought it was a matter of some importance that the defendant Mathura Kurmi was insisting upon getting possession of the property in suit. I do not see how this has much bearing upon the question under consideration. If Mathura Kurmi wanted to have a mortgage with possession he would naturally insist on possession.

On the other hand, if he desired to be the purchaser of the property he would also be desirous of obtaining possession It is the fact that a considerable portion of the property in dispute consisted of *sir* and *khud-kasht* lands which, in ordinary circumstances, Mathura Kurmi would not have been entitled to take possession of owing to the fact that under the Tenancy law, Babu Jagdeo Singh, either as a vendor or as a person granting a mortgage with possession, would have been entitled to retain possession of these lands with the rights of an occupancy tenant. It was this consideration which led to the execution of the document to which I have referred above, namely, the deed of relinquishment Again, the Subordinate Judge seems to have thought that Jagdeo Singh was more or less at the mercy of the first defendant I, on the other hand, have no reason to suppose that this was the case The oral evidence which was led before the court below shows that Jagdeo Singh only entered into this transaction or these transactions after having consulted his legal advisers

Lindsay, J

Perhaps the circumstance which weighed more with the Subordinate Judge in leading him to the conclusion that the transaction was one of mortgage was his finding that the sum of Rs. 15,000 was an inadequate price for the property in dispute. The learned Subordinate Judge has stated in one portion of his judgement that he thought that this property could not be worth less than Rs. 22,000 or Rs 23,000 He referred to the fact that it had been acquired on the 19th of April, 1900, by Babu Jagdeo Singh and his brother Lal Bahadur Singh. The document at page 25 shows that on the date just mentioned a 6 anna 11 pie share in mauza Mundila Khurd was sold to these two persons for a sum of Rs. 18,000. The property sold included a house and a cattle-shed. The

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Subordinate Judge thought that, having regard to the value of the property as disclosed by this document and also having regard to the general enhancement in land values, the 6 anna and 3 pie share which was transferred to Mathura Kurmi in May, 1915, could not be worth less than Rs 22,000 or Rs. 23,000

It would not, however, be safe to arrive at a conclusion regarding the value of the property in dispute merely on the basis of this document of the year 1900 It is apparent that the persons who sold this property in the year in question were indebted to Babu Jagdeo Singh and his brother who were making pressing demands for the sum which was owing to them The vendors declare that they find it impossible to discharge the debts they owe to Jagdeo Singh and his brother without selling a portion of the property, and it was in these circumstances that they transferred the property to Jagdeo and his brother in satisfaction of their debts. There really was before the court below very little reliable evidence regarding the value of this 6 anna 3 pie share in mauza Mundila, and the conclusion arrived at by the learned Subordinate Judge is more in the nature of speculation than anything else. While it may be true, as a general proposition, that the value of land has gone up in recent years, it is nevertheless important to consider that in this district of Basti the right of pre-emption is general and that a great many suits for pre-emption are brought after sales of property have been arranged. The fact that such claims for pre-emption can be enforced and are frequently enforced must have some influence upon the prices which persons are willing to give for landed property. No man is likely to give the full market value of property if after the transaction of sale has been concluded he has to fight out a suit for pre-emption Another circumstance which weighs with

me in considering this matter is this :—This so-called sale took place on the 22nd of May, 1915, in the second year of the war, and I am very much disposed to doubt whether there was then any eagerness on the part of people with money at their disposal to lock it up in investments in landed property

Lindsay, J.

There are two solid facts which emerge from the documentary evidence in this case. It is proved from Ex. 16 printed at page 179 of the record that in the settlement of the Basti district which took place in or about the year 1887 the land revenue of the entire 16 annas of this village of Mundila Khurd was only Rs 450. On a 6 anna and 3 pie share the proportionate revenue would, therefore, come to about Rs. 176.

Again, in Ex. 11 at page 107 of the record we find that in the new settlement, about the year 1917, this 6 anna and 3 pie share was assessed at Rs. 242-8-0 per annum. There was, therefore, a fairly substantial increase in the revenue imposed upon this share at the later settlement. If we take the revenue assessment of Rs 242-8-0 as a basis, then on the general principles of assessment this figure would indicate that the profits of this 6 anna and 3 pie share would amount to somewhere about Rs 300 a year or at an outside calculation Rs. 350 a year. If we take this to be the net value of the profits of a 6 anna 3 pie share in mauza Mundila then a sum of Rs. 15,000 offered in the year 1915 would represent over forty years' purchase of the profits and that, I think, would be a very handsome price to pay.

I am unable, therefore, to hold that an offer of Rs. 15,000 for this property in the year 1915 would have been an inadequate offer for an absolute sale of the property.

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I come now to discuss the language of the documents in the case, for it appears to me that the questions now before us must be decided on the language of the instruments themselves, and in dealing with this matter it is, I think, an important circumstance to be considered that the document of sale and the deed of agreement for re-purchase were executed on one and the same day I have little doubt in my own mind that although these deeds purport to be evidence of separate and distinct transactions they nevertheless do represent in substance one transaction and it is on that footing that I proceed to an examination of the language contained in them.

To take first the document of sale. This purports to be an absolute sale free of any condition whatever. There is no reference in the document to any understanding for an agreement for the re-conveyance of the property. As it stands, the document professes to be nothing more nor less than a deed of out-and-out sale. We come then to the document providing for the re-purchase of the property I have already set out the substance of this deed, but I have now to refer to the particular clause in which is contained the option of re-purchase which is professedly given to Babu Jagdeo Singh This clause reads as follows :—

" Whenever after seven years Babu Jagdeo Singh or his heirs out of their own funds actually and duly pay the whole consideration for the sale-deed to me or to my heirs or make a deposit of this money in our favour then I and my heirs shall certainly return to him the whole of the share mentioned in the aforesaid sale-deed "

I have already referred to the fact that the Subordinate Judge was impressed with the manner in which this clause giving a right of re-purchase was expressed It is clear that on a strict interpretation of this clause the right of re-purchase was to be

exercisable by Babu Jagdeo Singh at any time after the expiry of seven years from the date of the deed. There was no provision made for the giving of notice of intention to exercise the option No period is fixed within which the option must be exercised nor is any date laid down upon which the money is to become payable. As it stands, the clause gives Babu Jagdeo Singh the option of getting this property back at any time after the expiry of seven years from the 22nd of May, 1915 It will, I think, be conceded that this is a most unusual form in which to draw a clause giving an option of re-purchase. The ordinary form is one by which the exercise of the option is limited to a particular period The person who has the right to purchase must exercise the option within a definite period or upon particular dates

Clearly, having regard to the language of this clause for re-purchase it must be held that time was not of the essence of this arrangement between Mathura Kurmi and Jagdeo Singh. It is well settled that if an owner of land and an intending purchaser enter into a contract which constitutes between them the relation of vendor and purchaser and there is a stipulation in the contract that the purchase money shall be paid and the contract completed on a certain date, the principle is that time is not of the essence of the contract and the circumstance of the day fixed for payment of the money and completion of the purchase being passed does not entitle either party to refuse to complete. But, on the other hand, it is equally well settled that where there is a contract between the owner and another person that if such person shall do a specified act then the owner will convey the land to him, the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified The condition for re-purchase must be performed strictly and

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it is, therefore, held that in all agreements by which an option to re-purchase is given, time is of the essence of the contract.

Lindsay, J.

When we find a document like this agreement executed by Mathura Kurmi in favour of Jagdeo Singh, on the 22nd of May, 1915, in respect of which it cannot possibly be argued that time was of the essence of the contract, it seems to me that we must hold that this agreement is not evidence of a contract for sale with a covenant for re-purchase, but should be treated rather as evidence that the parties intended that the relation between them should be that of mortgagor and mortgagee. This point came prominently to notice in a recent case decided by their Lordships on appeal from the High Court of Madras, viz., *Narasingerji* v. *Panuganti* (1) At page 744 of the reports the judgement reads as follows :—

> " But if time was of the essence for such re-purchase it could in no circumstances be postponed beyond six years from the date of the conveyance Clearly, therefore, and within the intendment of the documents themselves, time is not of the essence in this matter; so soon as that is established all pretence for holding this ostensible sale and re-purchase to be anything else than a mortgage by conditional sale disappears "

The case which is now before me is a much stronger one than that which was under the consideration of their Lordships in the judgement just mentioned. I have referred to the language of the clause by which the right of re-purchase of the property is reserved to Jagdeo Singh, and, as I have said, this language is altogether inconsistent with any notion that time was of the essence of the matter. If that be so then, to repeat the words of the authority just referred to, " all pretence of holding this ostensible sale and re-purchase to be anything else than a mortgage by conditional sale disappears."

(1) (1924) I.L.R., 47 Mad., 729.

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I have only to refer to one other circumstance which was brought to notice during the course of argument and upon which strong reliance has been placed for the purpose of showing that the transaction was a transaction of out-and-out sale with agreement for re-purchase.

Lindsay, J

It is proved from the document Ex G at page 67 of our record that on the 10th of March, 1918, that is to say, almost three years after the execution of the agreement under consideration, Jagdeo Singh received from Mathura Kurmi a sum of Rs. 5,522 principal and Rs 1,314 interest, totalling Rs 6,836 which, according to this receipt, was owing to Babu Jagdeo Singh under the sale-deed It is argued that having regard to what is stated in this receipt the court ought to come to the conclusion that the transaction between the parties was one of sale and that this document is proof that portion of the purchase money was paid some three years after the sale-deed was executed.

Jagdeo Singh was in the witness-box and this document was not put to him, nor again was it put to Mathura Kurmi who also gave evidence in the case. It is, therefore, not possible to arrive at any accurate conclusion as to the reasons why this money was paid and why this document of receipt was executed in this particular form. However, we have to refer back to the sale-deed Ex. A executed on the 22nd of May, 1915. The various items which go to make up the consideration of Rs. 15,000 are set out in detail in this document, and item No 5 shows that a sum of Rs. 5,500 was left with Mathura Kurmi for payment to Ram Kishen and others, persons to whom Babu Jagdeo Singh was indebted under a deed of simple mortgage executed by himself and his brother on the 31st of January, 1912. This sum of Rs. 5,500 was

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supposed to represent the half share of this debt owing by Jagdeo Singh.

The deed of sale sets out that "should the creditor aforesaid not take the money or if for some reason the said amount be not deposited in the court, the vendee (that is Mathura Kurmi) should pay the amount assigned to him, the executant, personally or by money order." The receipt Ex G does recite that after the execution of the document of the 22nd of May, 1915, Mathura Kurmi offered the money to Ram Kishen and the other creditors who refused to receive it and the consequence, therefore, was that this sum remained with Mathura up to the 10th of March, 1918, when, in pursuance of the arrangement set out in the document of the 22nd of May, 1915, he handed it over with interest to Jagdeo Singh. There can be no doubt that under the contract Jagdeo Singh was entitled to claim this sum from Mathura Kurmi in case it was not received by the creditors, Ram Kishen and others, and the fact that interest was paid by Mathura Kurmi on this sum of Rs 5,500 odd may be explained on the ground that Mathura was in possession of the property in dispute from the 22nd of May, 1915, in lieu of interest. Consequently if he held back this sum of Rs 5,500 he would be liable under the contract to hand this money over to Jagdeo Singh and Jagdeo Singh would be entitled to interest inasmuch as Mathura was in possession and getting interest on money which he had not advanced

It is to be regretted that the parties were not called upon to explain this transaction and, in the circumstances, I think it better to ignore it altogether.

For the reasons I have given, I have come to the conclusion that the decision of the Subordinate Judge is correct and should not be disturbed here in appeal. I would, therefore, dismiss this appeal with costs.

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SULAIMAN, J. :—The question whether a particular transaction was a mortgage by conditional sale or a sale with an independent agreement for re-purchase is often one of considerable difficulty. For transfers, not governed by the Transfer of Property Act, the main question for inquiry used to be the true intention of the parties, that is to say, whether they intended it to be a sale or a mortgage. Oral evidence of intention was, of course, not admissible for the purpose of construing the deed or ascertaining the intention of the parties, as it was excluded by section 92 of the Indian Evidence Act. The case had to be decided on a consideration of the contents of the document with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the document was related to existing facts. *Balkishen Das* v *Legge* (1) The cases of *Situl Purshad* v. *Luchmi Purshad* (2) and *Bhagwan Sahai* v *Bhagwan Din* (3) had been decided on the same principle As observed by their Lordships of the Privy Council in *Jhanda Singh* v *Wahid-ud-din* (4), it was not disputed that the test in such cases was the intention of the parties to the instrument "That intention, however, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances" Even in a case of a deed governed by the Transfer of Property Act their Lordships disposed of the case with no reference to any oral evidence other than that of surrounding circumstances such as was clearly required to show in what manner the language of the document was related to the existing facts *Narasingerji* v. *Panuganti* (5) Undoubtedly, therefore, the real intention is the primary question

(1) (1893) I L R, 22 All, 149 (2) (1883) I L R, 10 Calc, 30
(3) (1890) I L R, 12 All, 387. (4) (1916) I L R, 38 All, 570 (576)
(5) (1924) I L R, 47 Mad., 729.

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The Transfer of Property Act of 1882 has, however, codified the law and defined what a mortgage by conditional sale is That definition is both exhaustive and conclusive. A transaction cannot amount to a mortgage by conditional sale unless it fulfils the conditions of section 58 (*c*). Nor can a transaction be not a mortgage by conditional sale if it comes within that section. The ascertainment of the true intention used to be a matter of considerable difficulty. The legislature has come to the rescue of the courts and laid down certain conditions which, if fulfilled, would make the sale a mortgage If the mortgagor ostensibly sells the mortgaged property on condition (*a*) that on default of payment of the mortgage money on certain date the sale shall become absolute or (*b*) that on such payment being made the sale shall become void or (*c*) that on such payment being made the buyer shall transfer the property to the seller, the transaction, though in the garb of a sale, is, in the eye of the law, a mortgage by conditional sale Sales with an independent covenant for re-purchase have a resemblance to the third class of ostensible sales mentioned above. The section provides that where a mortgagor has ostensibly sold his property on condition that on payment of the mortgage money the buyer shall transfer the property to the seller, the transaction is a mortgage by conditional sale. I take it that this would be so even though the language of the document itself does not use the words "mortgagor," "mortgaged property" or "mortgage money." The conveyance may ostensibly be a deed of sale, that is to say, with all the phraseology employed in drafting sale-deeds, but if that sale is in reality subject to a condition of a re-transfer on payment of the amount the law regards it as a mortgage by conditional sale. If it were necessary that the document itself should

contain the words that it was a mortgage, in many cases the transaction would not look an ostensible sale. In my opinion the presence in the deed of such words as literally imply a mortgage is not absolutely necessary The cardinal point is whether the sale is subject to a condition of re-purchase on payment

Sulaiman, J.

It seems to me that if a document is in the form of an ordinary conveyance usually found in India and executed by the transferor only, and it contains a covenant for re-purchase on payment of the consideration, the transaction would come exactly within the definition of a mortgage by conditional sale. In such cases I would have the utmost difficulty in trying to take it out of the scope of section 58. Such was the case in *Mohindra Man Singh* v. *Maharaj Singh* (1). It is true that a somewhat similar case arose in *Bishumbhar Nath* v. *Muhammad Ubaid-ullah Khan* (2) where a different view was taken. But apparently the learned Judges who decided that case were considerably influenced by the circumstances that the deed which was of 1886 was being attacked after a long period of years The learned Judges strongly relied on the Full Bench case of *Muthuvelu Mudaliar* v *Vythilinga Mudaliar* (3) But in this Full Bench case there were two separate documents.

In the present case we have two separate documents of the same date. In order to determine whether the sale was subject to the condition entered in the agreement, one test to apply is whether the two documents were part and parcel of the same transaction, or whether they were mutually independent. If the two were separate transactions altogether the sale could not possibly be said to have been subject to any condition for re-purchase. As remarked by their

(1) (1922) I L.R., 45 All., 72 (2) (1923) I L.R., 45 All., 581
(3) (1919) I L R., 42 Mad., 407

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Lordships of the Privy Council in *Jhanda Singh* v. *Wahid-ud-din* (1):

"If no such agreement was made before the deed of sale was executed and the latter deed was an afterthought, only suggesting itself after the sale-deed had been executed and delivered, it would not suffice The execution of the deed of sale and of the contract of re-purchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction"

It is only when the two are one and the same transaction that the sale could be conditional Logically speaking, the converse of the proposition laid down in the passage quoted above may not necessarily be true. The Full Bench of the Madras High Court in *Muthuvelu Mudaliar* v. *Vythilinga Mudaliar* (2) held that their Lordships did not mean to lay down that if there was a single settlement and the two documents were connected and interdependent, it necessarily led to the inference that there was a mortgage and not a sale The Bench thought that all that was said was that an essential requisite for construing such documents as a mortgage was that they should be dependent upon a single arrangement, and not that such a test was a conclusive criterion of the transfer transaction being a mortgage. The question referred to the Full Bench was whether, when in one and the same transaction land was sold absolutely but a right of repurchase was to be exercised before a certain date, the transaction necessarily became, by virtue of section 58 of the Transfer of Property Act, a mortgage by conditional sale, whatever the intention of the parties might have been. The Full Bench answered this question in the negative. It may perhaps be possible to conceive of a rare case in which the sale and the agreement to re-transfer, though part and parcel of the same transaction, are yet independent in the sense

(1) (1916) I L R, 38 All, 570 (575) (2) (1919) I L R., 42 Mad., 407.

that the sale is not subject to that condition and that the parties intend that the transaction should remain a sale and not a mortgage. Without definitely saying that such a thing is possible, I am prepared to assume that it is so and that the singleness of the transaction, though a strong test, is yet not an absolutely conclusive test that the transaction was a mortgage, and that in spite of the single transaction it may nevertheless be shown that the intention of the parties was otherwise. In most cases, however, the circumstance that the sale by the transferor and the agreement by the transferee are both part and parcel of the same transaction would undoubtedly justify the inference that the sale was subject to the condition of re-purchase.

The cases before their Lordships of the Privy Council, except the Madras one, were cases of deeds not governed by the Transfer of Property Act. In *Situl Purshad's* (1) case, though the documents were of the same date, full price had been paid. In *Bhagwan Sahai's* (2) case the suit was brought more than 50 years after, when the burden lay heavily on the person alleging that the transaction was not what, on the face of it, it appeared to be On the other hand, in the cases of *Ram Saran Lal* v. *Amirta Kuar* (3) and *Balkishen Das* v. *Legge* (4), though there were separate documents of the same date, the transactions were held to be mortgages. *Jhanda Singh's* (5) case requires special consideration. The deed of conveyance was dated the 29th of August, 1852. The deed of agreement was dated the 5th of September, 1852 Under the law as it then stood, registration was not at all necessary and title passed with the execution of the first document. Next year, namely in May, 1853, the

(1) (1883) I L R , 10 Calc , 30
(2) (1890) I L R , 12 All , 387.
(3) (1880) I L R , 3 All., 369
(4) (1899) I L R., 22 All , 149
(5) (1916) I L R , 38 All., 670.

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two documents were presented for registration separately by the executants on the 18th and the 19th. They, however, were entered in the register by the Sub-Registrar on the same date. The transaction was being challenged more than 50 years after these documents, when the parties thereto and the witnesses had all died. Their Lordships held that the burden to show that the second deed was not an afterthought but a part and parcel of the same transaction as the first, had not been discharged. When sitting on the Full Bench, which had heard this case before the appeal to their Lordships of the Privy Council, RICHARDS, C J, remarked (1), that there could be no doubt that if the two deeds were of even date, an almost irresistible presumption would arise in favour of the transaction being a mortgage. The identity of the date, however, is by no means absolutely conclusive, as is clearly shown by the remarks of their Lordships of the Privy Council in the same case (2).

If the conveyance and the agreement were interdependent it is obvious that there would be reciprocal consideration. On the other hand, if the agreement were either an afterthought or at any rate wholly gratuitous, it may be difficult to see how it will become specifically enforceable in a court of law, if the vendee subsequently refuses to abide by it. A mere voluntary promise to reconvey without any corresponding consideration would be void as a contract In such cases, therefore, it is necessary to consider whether, where a conveyance and an agreement are part and parcel of the same transaction, the transferor was really content to have a mere voluntary and gratuitous promise from the transferee, which he could not enforce against the transferee's will, or whether he intended to convey the property subject to the condition of re-transfer, in

(1) *Vide* I L R, 39 All, 565 (600) (2) (1916) I L R, 38 All, 570 (579).

which case there would be consideration passing from either party.

Coming to the facts of this case, there are several circumstances which point to the sale being subject to the condition of re-purchase. It is true that none of these by itself may be conclusive, but the cumulative effect of all these circumstances is undoubtedly in favour of the respondents.

Sulaiman, J.

The sale-deed, the deed of relinquishment and the agreement were all executed on the same date, namely, on the 22nd of May, 1915. They were faired out by the same scribe Kalapnath. They were attested by the same attesting witnesses and at the same place. It is clear from the evidence that they were completed at one and the same sitting. They were presented for registration on the date, namely, the 14th of June, 1915, and presented one after the other. The stamp of the sale-deed was purchased by the transferor. Ordinarily speaking, the duty is payable by the mortgagor or the vendee, and not the vendor. The property transferred consisted of *sir* plots to a very large extent It is reasonable to believe that the transferee would try to make sure that the relinquishment must, therefore, have been a part and parcel of the contract of sale and the consideration paid must have been in respect of both the conveyance and the relinquishment. And yet this one transaction was evidenced by two separate documents Is it not more likely that the agreement evidenced by a third document was also a part and parcel of the same transaction? Had the agreement been entirely gratuitous and voluntary and made out of mere grace, there was no necessity to complete the document simultaneously with the other deeds. It could have been executed and registered later on. Even prior to this transaction there was a relation of a debtor and creditor existing between the

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parties. Although the plaintiffs have not given any convincing evidence to show that the real value of the property was much more than that of the amount paid as consideration, there is also no conclusive evidence on behalf of the defendant that full price was in fact paid. Various previous transactions, e g , the mortgage of 1914 in favour of the defendant himself and the earlier sale-deed of 1900 by which this property was acquired by the vendors undoubtedly show that the rates of purchase prevailing in this locality are enormously high

The sale-deed contains an express provision that

" if the executant or his heirs put forth a claim as regards the *sir* or *khudkasht* or expropietary land . or there be any obstruction or defect in the vendee's possession or enjoyment of the produce then he or his heirs may duly recover the entire amount of consideration or to the extent of the loss together with costs and interest at the rate of four annas per rupee per annum from the property sold or other property of the executant " .

There was thus not only a warranty of title, but a right was given to the vendee to recover the consideration money if there was any obstruction in the delivery of possession The agreement also expressly provided that if possession of the *sir* cultivation was not given then the transferor would have no right to have the property reconveyed to him. Another significant provision is that the transferee was secured in his possession for at least a period of seven years, which meant a certain investment for a definite time, and after the expiry of that period the transferor and his heirs had an unlimited time to get the property reconveyed Ordinarily, for a mere covenant for re-purchase there is a time-limit in which the option is to be exercised. But here the time apparently was not of the essence of the contract. If it were not a mortgage, in which

case the 60 years limitation would apply, the transferor and his heirs would be able to come at any time in future and ask that the property be restored to them This would be an intolerable burden on the vendee and his heirs. As to the case of *Jhanda Singh* (1), the agreement is quoted at length in the judgement of the learned Chief Justice reported in I L. R., 33 All , 585 at 586. Although some parts of it were somewhat self-contradictory and the time fixed was " after the lapse of nine to ten years, " there was a further clear provision that " if they be not ready to purchase the property and to pay the purchase money *within the aforesaid time*, they shall have no claim to the aforesaid property after the expiry of the period of ten years." In the present case there is no such limitation. The time for repayment is not of the essence of the contract, which circumstance was prominently relied upon by their Lordships of the Privy Council in the case of *Narasingerji* v. *Panuganti* (2)

The reason for adopting a cumbersome method instead of drawing up a mortgage-deed might very well have been the desire to have a separate deed of relinquishment of the ex-proprietary rights executed and to have a separate deed of agreement conditional on the relinquishment of those rights. As the property transferred consisted of nearly 119 bighas of *sir* plots out of a total of 297 bighas, the anxiety of the vendee to make sure that he would obtain actual possession of the cultivatory holdings is intelligible. The payment to Jagdeo Singh of the balance of the consideration which had been left in the hands of the transferee for payment to a prior creditor as evidenced by the receipt, dated the 10th of March, 1918, can be easily explained by the circumstance that the transferee was to remain in possession of the property and appropriate the profits and there was to be no account

(1) (1916) I L R., 38 All , 570. (2) (1924) I L.R., 47 Mad , 729.

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taking at the time of the re-conveyance. The amount had, therefore, to be kept intact and a convenient way for doing that was to pay back the balance to Jagdeo Singh himself rather than enter into a complicated calculation of the actual proportionate profits.

Having regard to these circumstances I have no doubt in my mind that the sale was subject to the condition of re-conveyance on payment of the entire consideration and that it fell within the definition of mortgage by conditional sale as given in section 58 (*c*) of the Transfer of Property Act

BY THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

1926 *December, 6*

AMPURNA KUNWAR (DEFENDANT) *v.* RAM PADARATH AND OTHERS (PLAINTIFFS) AND BALRAJ KUNWAR AND OTHERS (DEFENDANTS).*

Mortgage—Prior and subsequent incumbrances—Mortgage executed to satisfy prior mortgage—Question whether prior mortgage was kept alive beyond the period of limitation natural to it

On the 15th of March, 1898, eight villages were mortgaged to *B* by way of simple mortgage for a period of three years On the 1st of November, 1898, the same villages were mortgaged to *A* On the 4th of May, 1900, two of the eight villages (R and K) were again mortgaged to *B*, this time by way of usufructuary mortgage. Under this mortgage the mortgagee was entitled to sue for the amount due to him on dispossession and in that case he was entitled also to recover from the property hypothecated by the first mortgage. *B* was dispossessed of the village K on the 24th of February, 1911. Meanwhile he had purchased in 1904 the village R, but, as the result of a suit brought by the second mortgagee *A*, in 1909, that village was again sold and was purchased by *A*.

* First Appeal No 469 of 1923, from a decree of Ali Ausat, Subordinate Judge of Jaunpur, dated the 14th of August, 1923,

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Held, on suit by *B* to enforce the first mortgage by sale of certain villages, that the suit was barred by limitation. If that mortgage was kept alive by the mortgage of May, 1900, it was not given a second birth, and if the plaintiffs retained a right to sue on the simple mortgage of March, 1898, at all, they could do so only in accordance with the rule of limitation applicable to that bond.

Mahomed Ibrahim Hossain Khan v. *Ambika Pershad* (1) and *Deputy Commissioner of Lucknow* v. *Pandit Sukhnandan* (2), referred to.

THIS was a suit brought to enforce a simple mortgage of the 15th of March, 1898, by the sale of certain villages. The mortgage was for Rs. 13,200 bearing interest at 1¼ per cent. per mensem, for a period of three years, and eight villages were hypothecated. The mortgage was executed to pay off earlier mortgages. On the 1st of November, 1898, the mortgagor executed a second mortgage of the same villages to Babu Indar Sen Singh, who subsequently died leaving a widow, Musammat Anpurna Kunwar. On the 4th of May, 1900, the mortgagor executed a usufructuary mortgage in favour of the plaintiffs for a sum of Rs. 17,712 due on the mortgage of the 15th of March, 1898, and other items, amounting in all to Rs. 22,500, giving possession of the two villages of Rajdharpur and Konda. Under this mortgage the mortgagee was entitled to sue for the amount due to him on dispossession, and he would in that case be entitled to recover also from the property hypothecated under the bond of the 15th of March, 1898. The plaintiffs were dispossessed of the village of Konda on the 24th of February, 1911. Meantime the plaintiffs had, in 1904, purchased the village of Rajdharpur, but as the result of a suit brought by the second mortgagee Musammat Anpurna in 1909, the

(1) (1912) I.L.R., 39 Calc., 527. (2) (1913) 17 Oudh Cases, 38.

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village of Rajdharpur was again sold and purchased by Musammat Anpurna

The plaintiffs filed this suit on the 9th of December 1922 and obtained a decree against three villages, namely, Rajdharpur and Pura Sarwan, in the possession of Musammat Anpurna, and Khalispur which had been purchased in 1919 by Durbali Tiwari (defendant 4). An appeal was filed by Musammat Anpurna, who claimed that the suit was barred by limitation as against the villages of Rajdharpur and Pura Sarwan.

Dr. *Kailas Nath Katju* and Munshi *Kamla Kant Varma*, for the appellant

Munshi *Haribans Sahai*, Maulvi *Muhammad Abdul Aziz*, Pandit *S. S. Sastry* and Munshi *Gadadhar Prasad*, for the respondents

THE judgement of the Court (DALAL and PULLAN, JJ.), after stating the facts as above, thus continued :—

The suit has been decreed on two grounds first, because the mortgage of 1898 has been held to have become merged in the mortgage of 1900, and thereby acquired the period of limitation applicable to that deed, and, secondly, because the order of the District Judge of Azamgarh passed in 1912 in Anpurna's own suit, to the effect that her claim was subject to the prior charge of the plaintiff's mortgage, operates as "practically" *res judicata*. We do not agree with either of those findings. The deed of May, 1900, although executed to satisfy the mortgage of March, 1898, is of an entirely different nature. Under the simple mortgage the mortgagee had a right to sue for the principal after three years, under the usufructuary mortgage he could sue at once if he failed to get possession or a claim was brought for expropriatory

rights, but otherwise he could only sue on being dispossessed. This was an entirely new burden on the property of which the puisne mortgagee had no notice and we are not prepared to find that she should be bound by an agreement altering the period of limitation allowed for a suit on the prior mortgage. In *Mahomed Ibrahim Hossain Khan* v *Ambika Pershad Singh* (1), their Lordships of the Privy Council held that when a suit was brought on a simple mortgage of 1888, seeking to make certain property covered by that mortgage and by a *zarpeshgi* deed of 1877 liable for the decretal amount, the right of priority set up by the plaintiffs on the *zarpeshgi* deed was barred by limitation, as the suit should have been brought within twelve years of the date when the money due on that deed became repayable. The principle in that case is the same as in the appeal before us. The same view was taken by LINDSAY, J., when Judicial Commissioner of Oudh, in *Deputy Commissioner of Lucknow* v *Pandit Sukhnandan* (2). It may be that the simple mortgage of March, 1898, was kept alive by the mortgage of May, 1900, but it was not given a second birth, and if the plaintiffs retained a right to sue on the simple mortgage of March, 1898, at all, they did so only in accordance with the rule of limitation applicable to that bond, and their suit became time-barred in March, 1913.

In order to meet this position the plaintiffs argue that the usufruct of the two villages enjoyed by them in accordance with the mortgage of May, 1900, should be regarded as a payment of interest on the simple mortgage of March, 1898. This objection is easily answered by a reference to the terms of the mortgage of May, 1900. This mortgage was for a

(1) (1912) I. L. R., 39 Calc., 527 (2) (1912) 17 Oudh Cases, 38

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sum of Rs 22,500 and the usufruct of the two villages was given to satisfy the interest on that sum, and not the interest due on the prior mortgage for Rs. 13,200. In our opinion there has been no payment or acknowledgement which would bring the suit within time under section 20 or 19 of the Limitation Act

As to the second finding of the learned Judge of the court below that the decree of 1912 has practically the effect of *res judicata*, we are of opinion that this view is mistaken In 1912 the mortgage of March, 1898, was still within time, and still had priority to the mortgage of November, 1898, on which the plaintiff in that suit based her claim The fact that the plaintiff's charge was then declared to have priority in no way prevents the claim from subsequently becoming barred by time.

Nor can the plaintiff base his suit on the deed of May, 1906, and obtain a decree for sale subject to the appellant's mortgage rights, because when an opportunity was given to the plaintiff in 1912 to redeem the intermediate mortgage, he refrained from doing so, and allowed the sale to be executed in favour of Musammat Anpurna

In our opinion the plaintiff's suit as against the villages of Rajdharpur and Pura Sarwan was barred by limitation. We allow the appeal with costs against the contesting respondents and order that these two villages shall be exempted from the decree.

Appeal allowed.

1926 December, 14

Before Mr. Justice Dalal and Mr. Justice Pullan

RUGGHAN PRASAD AND ANOTHER (DEFENDANTS) *v.* DHANNO (PLAINTIFF) AND LACHHMI NARAIN AND ANOTHER (DEFENDANTS).*

Religious endowment—Power of mutawallis *to nominate successors—Death of both without making appointment —Suit by author of trust for declaration of his right to appoint—Civil Procedure Code, section* 92—*Act No* 1 *of* 1877 (*Specific Relief Act*), *section* 42.

Under the terms of a deed of endowment two *mutawallis* were appointed, and it was provided that each of the two had the power to appoint his own successor as *mutawalli* or a successor to the other in the event of his dying without making an appointment. Ultimately both *mutawallis* died without appointing any successors

Held, that it was competent to the legal representative of the founder of the trust to sue to have it declared that the right of appointment had devolved upon himself, and that neither section 92 of the Code of Civil Procedure nor section 42 of the Specific Relief Act, 1877, was a bar to the suit

Deokali Koer v. *Kedar Nath* (1), distinguished.

THE facts of this case were as follows :—

One Basant Lal, in 1906, executed a deed which he described as a *waqf* in favour of a temple situated in Sarsuiya Ghat in Cawnpore, in which he re-dedicated certain property which had already been dedicated for the same purpose by his father and grandfather. Under the terms of this deed of *waqf* two persons had been appointed as *mutawallis*, Bansidhar and Narain Das. Paragraph 9 of the deed laid down that each member should have power to appoint his successor and if the member died without appointing his successor the other member should appoint another person in his place. Bansidhar died in 1917 and appointed no successor. Narain Das also died

* First Appeal No. 505 of 1923, from a decree of Syed Iftikhar Husain, First Subordinate Judge of Cawnpore, dated the 10th of May, 1923.

(1) (1912) I. L. R., 39 Calc., 704

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without appointing a successor Basant Lal then brought the present suit claiming a declaration that the right of appointing *mutawallis* for this endowment had reverted to him and that he had made a valid appointment of two other persons Pending the suit Basant Lal died and his widow, Musammat Dhanno, was brought on the record in his place The suit was decreed by the lower court The defendants, who were the alleged appointees of the surviving *mutawalli*, appealed

Sir *Tej Bahadur Sapru* and Mr *P N Sapru* for the appellants.

Munshi *Girdhari Lal Agarwala*, for the respondents

THE judgement of the Court (DALAL and PULLAN, JJ.), after stating the facts as above, thus continued :—

An appeal has been preferred on the following grounds Firstly, it has been argued that the suit should have been brought after obtaining the permission of the Legal Remembrancer under section 92 of the Code of Civil Procedure Secondly, that the suit is barred by the provisions of section 42 of the Specific Relief Act Thirdly, that the plaintiff has no cause of action because a valid appointment had been made by Narain Das. Section 92 of the Code of Civil Procedure enumerates certain suits which can be brought after obtaining permission of the Legal Remembrancer. These suits can only be brought when there has been an alleged breach of a trust, or where direction of the court is deemed necessary for the administration of any such trust. Secondly, these suits must be for one of the eight objects enumerated from (*a*) to (*h*) in the section. None of these clauses directly cover a suit of the nature of the present declaratory suit.

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The essential difference is that the plaintiff in this case does not admit that there are any trustees in existence His contention is that the trust has been left without any manager and that he is entitled to step in. In our opinion section 92 makes no provision for a suit of this nature and we cannot find that the plaintiff is debarred from suing directly in a civil court.

Section 42 of the Specific Relief Act lays down the conditions under which a person may bring a suit for mere declaration without any consequential relief. It is argued before us that the plaintiff has under that section no right to bring the present suit and reliance is placed upon a ruling of the Calcutta High Court, reported in *Deokali Koer* v. *Kedar Nath* (1) In that case the plaintiff sought for a relief in respect of a certain property in which he had no interest, because of his interest in another property, and the court found that none of the declarations which he sought related to the plaintiff's legal character, or as to his right in the property. In the present case the declarations which the plaintiff seeks are as to his legal character because he claimed a right, as being either the founder of the trust or the successor of the founder of the trust, to appoint a *mutawalli*, and he also claims a right as to the property (if these words can be taken to include the right to interfere in the management of the property). Lastly, we have to consider the question of fact Three witnesses are called to show that Narain Das made a valid appointment of his brother Rugghan Prasad as *mutawalli* of this trust The lower court held wrongly that this suit was governed by the Indian Trusts Act and that therefore, the omission to make an appointment in writing renders any appointment orally made by Narain Das invalid But we are satisfied that the

(1) (1912) I L R, 39 Calc, 704.

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evidence is not sufficient to prove that even an oral appointment was made. It may be the fault of the counsel in the lower court, but neither Rugghan Prasad nor Kanhaiya Lal stated that Narain Das made any appointment to take effect after his own death and the third witness Balchand admitted that he did not know which of the two trusts in the management of Narain Das was being made over to Rugghan Prasad. It is also evident from all the evidence that the man who is really managing the trust is one Gaya Prasad alias Kammo. Another point which makes the evidence difficult to believe is the assertion of all the three witnesses that Basant Lal himself was present while Narain Das was making the appointment of his successor. If Basant Lal was present at the time and made no objection, no reason has been given why he should have raised this objection subsequently and filed a suit. In our opinion the plaintiff is entitled to the declaratory decree which he has obtained in the lower court, and we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Dalal and Mr. Justice Pullan

1926 December, 23

HARDEO DAS, NANAK CHAND (PLAINTIFF) *v.* RAM PRASAD, SHYAM SUNDAR AND OTHERS (DEFENDANTS) *

Act No. IX of 1872 (Indian Contract Act), section 30—Wagering contract—Principal and agent—Suit by principal to recover money deposited with agent as security.

An agent employed to carry out wagering contracts cannot plead the illegality of such contracts as a defence to an action brought by the principal to recover from the agent money received by him from the principal by way of security for

*Second Appeal No. 1917 of 1924, from a decree of Abdul Halim, Additional Judge of Meerut, dated the 3rd of May, 1924, reversing a decree of J. N. Mushran, Subordinate Judge of Meerut, dated the 30th of November, 1923.

the fulfilment of such contracts *Bhola Nath* v *Mul Chand* (1), followed. *Chhanga Mal* v *Sheo Prasad* (2), overruled, and *Daya Bhai Tribhovan Das* v *Lakhmichand, Panachand* (3), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Babu *Satish Chandra Das*, for the appellant.

DR. *Kailas Nath Katju*, for the respondents.

DALAL and PULLAN, JJ :—The finding of the lower appellate court is that the defendant was an agent of the plaintiff to carry out wagering contracts There was no evidence of the defendant having derived any profit under those contracts and so the plaintiff's suit as to profits was rightly dismissed The question, however, remains regarding the recovery of Rs. 400 deposited by the plaintiff with the defendant by way of security. The lower appellate court dismissed this portion of the suit also, referring to a single Judge case of this Court, *Chhanga Mal* v. *Sheo Prasad* (2). We are not in agreement with that decision It rested on a ruling of the Bombay High Court, *Daya Bhai Tribhovan Das* v *Lakhmichand, Panachand* (3). The Bombay case was decided on the basis of a special Act, Bombay Act III of 1865, which has no operation in these provinces. As far back as 1903 a Bench of this Court held that an agent, who has received money to the use of his principal on an illegal contract between him as such agent and a third party, cannot be allowed to set up the illegality of the contract as a defence in an action brought by the principal to recover from the agent the money so received, *Bhola Nath* v. *Mul Chand* (1) Recently another Bench of

(1) (1903) I L R , 25 All , 639 (2) (1920) I L R , 42 All , 449
(3) (1885) I L R., 9 Bom , 358

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this Court has construed section 30 of the Indian Contract Act According to that decision the provisions of that section did not prevent a person who is employed as an agent in connexion with a wager from recovering the sums due to him by his principal The present is a converse case. Rupees 400 is due to the principal from the agent and the agent cannot plead the illegality of the contract The lower appellate court admitted that the agent would have to pay any profit made by him under such a contract There is the greater reason for asking the agent to refund any sum received by him from the principal to carry out such a contract.

We decree the appeal for Rs. 400. The rest of the appeal is dismissed. Parties shall receive and pay costs of all courts according to their success and failure

Appeal allowed

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji

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December 23

RAGHUBAR DAYAL AND OTHERS (PLAINTIFFS) *v.* MULWA AND OTHERS (DEFENDANTS) *

Act No IX of 1887 *(Small Cause Courts Act), Schedule II, article* 35 (n)—*Test of applicability of—Suit for compensation for cutting trees and removing fruit*—Bonâ fide *claim of right*

Article 35 (n) of the second schedule of the Small Cause Courts Act applies only to those acts which, by the circumstances of the case, are clearly alleged or shown to be punishable by the Penal Code Merely removing fruit or cutting trees under a *bonâ fide* claim of right, or as a result of the dispute, is not necessarily a criminal offence

THE plaintiffs were zamindars and by virtue of a partition became sole owners of plot No 1637 They brought a suit for the recovery of Rs 50 as

* Appeal No 69 of 1926, under section 10 of the Letters Patent

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damages on the allegation that the defendants illegally and without any right took away the fruits of certain mango trees standing on the plot. The defence was that the trees were planted by the ancestors of the defendants, and that the plaintiffs were never in possession. The Munsif held that the land of the plot in question belonged solely to the plaintiffs, but that the trees belonged to the defendants and dismissed the suit. On appeal the Subordinate Judge upheld this finding and also found that the defendants were in possession of the trees. The plaintiffs filed a Second Appeal to the High Court, and it was dismissed by a single Judge on the ground that the appeal was barred by section 102 of the Code of Civil Procedure. Hence this appeal under clause 10 of the Letters Patent.

Mr. *Akhtar Husain Khan*, for the appellants.

Appeal heard under order XLI, rule 11, of the Code of Civil Procedure.

WALSH, A. C. J., and BANERJI, J.:—In our view some of the cases have gone too far in holding that an act which may be *bonâ fide* and which may be done under a mistaken claim of right or which may be due to a *bonâ fide* act of negligence, yet may also be shown to have been done with a criminal motive or intention, is, therefore, a criminal act, and consequently exempt under article 35 (*ii*) of the schedule of the Small Cause Courts Act. We are not prepared to hold that merely because the facts stated are ambiguous and are, therefore, consistent with *bona fides*, although they are also consistent with *mala fides* according to the correct inference to be drawn, the act is, therefore, one necessarily of the kind referred to in this clause of the schedule. We think that something more ought to be shown, namely that the plaintiff, either by his specific allegations in the plaint,

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or in some other form, in the court of hearing, or by the nature of the evidence which he tendered at the hearing, distinctly alleged that the offence complained of was punishable under chapter XVII of the Code.

There seem to be two strong reasons why this view should be insisted upon, and why the courts should not go out of their way to apply this clause of the schedule and to treat an act as criminal which the person who complains about it has not himself treated as criminal. The first reason is that the introduction of this clause into the schedule was admittedly for the benefit of defendants who otherwise might be held guilty of criminal acts without the possibility of appealing and without a full record of the evidence. Secondly, we think that to do so does violence to the provisions of chapter IV of the Penal Code. The clause distinctly says that the act must be one which would be an offence. In our opinion, this is a clear indication that the legislature intended to exclude from the operation of this clause *bonâ fide* acts such as would be exempted from criminal responsibility under the Penal Code. As everybody knows, there are acts which are ambiguous, and which depend for their actual criminal responsibility upon the proper inferences to be drawn as to the intention of the person. The clause in question recognizes that ambiguity, and to our mind applies only to those acts which by the circumstances of the case are clearly alleged or clearly shown to be punishable by the Penal Code. We are not prepared to say that merely removing fruit, or cutting trees under a *bonâ fide* claim of right, or as the result of the dispute, is necessarily a criminal offence. The same reasoning would apply to the wilful, but not criminal, refusal to return a specific article lent, such as a book, or some other piece of movable property belonging to the

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plaintiff We have already decided today, agreeing with Mr. Justice DANIELS and dismissing an appeal from him, that where the plaint discloses no allegation of a crime, this article did not apply We think this is the correct view. We propose to maintain it in this case, and as these cases appear to be of somewhat frequent occurrence, we have thought it necessary to give our reasons at some length.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr. Justice Banerji

EMPEROR *v.* ALLAH MAHR AND ANOTHER *

1927

January 6.

Criminal Procedure Code, section 437—Revision—Order of discharge set aside by Sessions Judge—Reference to High Court by District Magistrate against order of the Sessions Judge.

On a case sent up by the police under section 304 and other sections of the Indian Penal Code, the magistrate concerned, without deciding judicially that the charge was groundless, and that the evidence did not establish any case, altered the charge under section 304 to one under section 304A and then proceeded to dismiss the case.

The complainant applied in revision to the Sessions Judge, who entertained the application under section 437 of the Code of Criminal Procedure and decided that the Magistrate had not acted according to law and that the case ought to be committed to the sessions under section 304 of the Indian Penal Code.

The District Magistrate thereupon passed an order purporting to be a reference of the case to the High Court and asked the Sessions Judge to forward it On the Sessions Judge refusing to do so, the District Magistrate sent up a reference to the High Court directly

* Criminal Reference No 626 of 1926.

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Held, that the District Magistrate had in the circumstances no authority to refer the case to the High Court *Fattu* v. *Fattu* (1) and *Dharam Singh* v *Jotı Prasad* (2), referred to

THE facts of this case are fully set forth in the judgement of the Court

The Assistant Government Advocate, Dr M. *Wali-ullah*, for the Crown

Munshi *Shiva Prasad Sinha*, for the applicant.

Mr. *Hamid Hasan*, for the opposite parties

WALSH, A. C. J , and BANERJI, J —This is a reference to this Court by the District Magistrate of Bulandshahr, the object of which apparently is to complain against, and to invoke the reversionary powers of the High Court with regard to, an order of the Sessions Judge For reasons which will appear in a moment, we can do no more than express an academic opinion about the decision of the Sessions Judge against which complaint is made

We have no jurisdiction to entertain this reference at all. It is not made to us under any section of the law, or under any known procedure. It stands no higher as a matter which we can entertain in due course of law, than a letter or complaint sent to the High Court informally by any citizen As a matter of strict procedure, it should never have been put up before a Judge in Court at all, although one can understand that the officials in the office entertained some doubt as to whether they ought to disregard it altogether or whether they ought to lay it before a Judge in Court to be dealt with In future the trial clerk and his department must disregard all such petitions, references or complaints, not made according to recognized procedure, and should submit them through the

(1) (1904) I L R , 26 All , 564 (2) (1915) I L R,, 37 All , 355,

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Registrar to the Chief Justice, for him to make such order as he, in his discretion, thinks desirable under the circumstances. We wish to make this clear beyond question or possibility of misunderstanding. Otherwise if other Magistrates, or other persons concerned to question an order made by a competent court of superior jurisdiction, like the Sessions Judge in criminal matters, chose to follow the unprecedented course adopted by the Acting District Magistrate in this case, the office of the High Court would be inundated with petitions and documents by way of complaint, without any legal foundation, and which would cause a serious amount of embarrassment and superfluous labour

What happened in this case was as follows:— Various charges and complaints were made with reference to a cattle trespass and a *marpit*, which ended in the death of a woman The police sent up the case under section 304, in addition to other sections and other complaints were made by private complainants before the Sub-Divisional Officer The Sub-Divisional Officer (we will omit for the moment other proceedings which were dealt with by him) dealt with the charge under section 304 in this way. He does not appear to have decided judicially that the charge was groundless, and that the evidence did not establish any case, but he altered the charge to one under section 304A, thereby dropping altogether the charge under section 304, and then proceeded to dismiss the case, which he could not have done if the charge under section 304 had remained We pass by for a moment the consideration of the question how far this order was in fact, or could be in law, interfered with by the Sessions Judge. What happened then was that the complainant applied in revision, which he had a perfect right to do, to the Sessions Judge, to reverse

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the order of the Magistrate; and the Sessions Judge entertaining the matter under section 437, as he had a perfect right to do, decided, for reasons which he expressed judicially in an order, that the Magistrate had not acted according to law, and that the case ought to be committed to the sessions under the original charge, section 304. Passing by, for a moment again, the question whether, in the particular circumstances of this case, that order was justified, it is clear that it was an order of the character which was within the competence of the Sessions Judge. It seriously affected the accused persons, because it was tantamount to an order that he, or they, should be put upon their trial under section 304. If that order had been made without any foundation in fact, or upon palpably inadequate materials, or in breach of the legal sanctions limiting the powers of the Sessions Judge, there was a remedy open to anybody prejudiced by that order. The person prejudicially affected by such an order has the right to apply to the High Court in revision to review an order of that kind, and if he can show that it was an order which never ought to have been made, and which the circumstances could not justify any Sessions Judge in making, this High Court has jurisdiction to reverse or modify such an order. No other form of procedure is known to us by which that order could be judicially reviewed.

The District Magistrate, for reasons into which we need not enter, and so far as they involve questions of law, are contained in a letter sent to the High Court on the 2nd of September, had decided to invoke the jurisdiction of the High Court to interfere with the order of the Sessions Judge. It appears from a letter of his, addressed to the Assistant Registrar of the High Court, dated the 27th of September, that the Sessions Judge, to whom the District Magistrate

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had submitted the reference for the purpose of its being forwarded to the High Court, had refused to forward it. That refusal appears to us to have been right, inasmuch as the District Magistrate has no power under any statutory provision, as we have already pointed out, to refer an order of the Sessions Judge to the High Court for the purpose of having it quashed, or modified, *a fortiori* he had not power to call upon the Sessions Judge to forward it to the High Court It would perhaps have been better if the District Magistrate, on receiving the refusal of the Sessions Judge, had taken advice, or taken some trouble to look into his own powers in the matter before taking the next step which he took, which we have already described as quite unprecedented, and one which, we trust, will not be repeated by any Magistrate under similar circumstances But what he did was in defiance of the rules on the subject. He sent the reference to the High Court. The Assistant Trial Clerk noted at once the informality of the proceeding, and wrote a note pointing out that a reference could only come through the Sessions Judge. This view was properly communicated to the District Magistrate In spite of that the District Magistrate persisted in the course which he had chosen, and resubmitted the record with the remark, to which we have already referred, that the Sessions Judge had refused to submit it himself. The result of that was that the office of the High Court found itself embarrassed by a reference for which there was no precedent so far as they knew, but which was persistently made under cloak of legal justification by a gentleman occupying the high and responsible position of a District Magistrate, and in the result the matter was put up in Court before my brother Mr. Justice BANERJI, and he realizing that the questions raised were out of the

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common, decided to issue notice to the parties, so that the matter might be discussed and settled once for all, and to refer it to a Bench of two Judges, which is the Bench now dealing with the matter

We can only repeat, what we have said, that the reference has no existence in law, and is not recognized by any legal procedure. If it is not to be treated as mere waste paper, it has at any rate no higher status than that of a private letter, addressed by some private individual to the High Court, and our duty is strictly confined to deciding that we have no jurisdiction to entertain the reference, and to direct the record to be returned.

Inasmuch, however, as the whole proceeding appears to have arisen out of a difference of opinion upon a very important question, which, however, is elementary, and has been clearly settled for many years, and ought to be known to everybody connected with the administration of the criminal law namely the duty of a committing Magistrate in dealing with a *primâ facie* case triable by sessions, we think it desirable to add a word or two by way of re-statement of the law in regard to that matter. In what we are saying we are only re-stating the settled principles by way of *obiter*, and the decision which this Court would be compelled to give, if, as we have pointed out was open to him, the accused person had applied to this Court in revision to set aside the order of the Sessions Judge. But the necessity of making this re-statement is created by the somewhat surprising *dicta* of a gentleman occupying the position of a District Magistrate, in the letter which he has written to the Registrar of the High Court, and which has come to be dignified by the name of a reference. The District Magistrate suggests that the action of the

Sessions Judge amounted to an unwarranted interference with the lawful exercise by the Magistrate of the discretion vested in him by section 209, and went on to state that the order was *ultra vires*. The Sessions Judge appears to us to have approached the matter strictly in accordance with the settled principles. He differed from the view taken by the Magistrate in reducing the charge from section 304 to section 304A for the following reason:—"If the prosecution evidence were true that the two accused intentionally assaulted the woman with *lathis*, of which she died, it is difficult to understand how the act would amount to no more than rashness or negligence" The view he took was that the Magistrate, while not rejecting the evidence, had disregarded the inference of criminal liability, legally and necessarily to be drawn from the *primâ facie* facts established by the prosecution evidence and had himself usurped the function of the trial court and reduced the quality of the acts testified to by the evidence to a totally different legal complexion, thereby shutting the door to the possibility of the alternative of a graver charge being established. Now it is easy to state in a question of a serious *marpit*, where serious bodily injuries, or death, have occurred, circumstances which raise a serious argumentative question of fact as to whether the acts complained of were committed with such intention as to amount to either section 302 or section 304, or were committed under such circumstances as although criminal, would amount to no more than rashness or negligence It is quite a simple matter for a committing Magistrate to deal with a case of that kind. He is not the trial court His duty, if the evidence is *primâ facie* adequate, is to commit and leave the ultimate judicial decision to the trial court, but if he has reason to think and is prepared to state for

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judicial reasons in the exercise of his discretion in the committal order that there is a possibility of an alternative view to that which is set out in the charge originally made, he can always commit the accused for trial on two or more alternative charges. What he cannot do is what was done in this case, namely, to shut the door finally to the possibility of trial upon evidence which *primâ facie* is capable of interpretation to support a graver charge. The question of the duty of a committing Magistrate, where he has doubts about the real nature of the offence, and the quality of the evidence, is really well settled, and should cause in the vast majority of cases no difficulty whatever One may place the classes of cases into three categories. There is the case where the evidence is *primâ facie* so clear that nobody can entertain any doubt that the matter ought to be tried. There is, on the other hand, the class of cases where the evidence is so palpably tainted, absurd, incredible and, as it has been described on occasions, groundless, that nobody could doubt that it would be a hardship and unjust to an accused person to allow the matter to go any further. There is the third category, which, of course, provides debatable ground, where the evidence is conflicting, and lays itself open to suspicion—but where, on the other hand, it may be true, and may commend itself to certain tribunals, the Magistrate, even though he may have reason to doubt whether if he were trying the case he would convict, has no right to substitute his judgement for the final judgement of the court indicated by law for the trial, and to arrive at a final decision dismissing the case in the way in which he would do if he were the trial court. If the evidence is balanced, however unevenly in his opinion, then it is a matter which has to be tried, and it is his duty to commit it for trial In England the

existence of the procedure of trial by jury makes the task of the Magistrate in such debatable cases perhaps easier than it is in India. At any rate in England an experienced Magistrate, although he is bound to acknowledge that there is evidence, which by itself is adequate to support a charge, can, taking a broad view, and not substituting his own judgement for that of the trial court, pronounce that he is perfectly satisfied that no jury would convict It is easier because it is well known that it is more difficult in a very debatable case to obtain an unanimous verdict from twelve men than from one. Therefore, if there is any difference between the practice in England and the practice in India, it is rather in the direction of reducing the number of cases in which a committing Magistrate in India is justified in throwing out the case as compared with a committing Magistrate in England We, in expressing our opinion in this matter, desire to endorse what has been laid down for many years in this Court as the correct test In *Fattu* v. *Fattu* (1) this Court laid down that a Magistrate has a wide discretion in the matter of weighing the evidence produced on one side or the other, the remedy for an erroneous exercise of such discretion being provided in the powers conferred on Sessions Judges and District Magistrates by the revisional sections But in the exercise of such discretion, if the question of discharge or commitment is one merely of probabilities, the inquiring Magistrate ought rather to leave the decision thereof to the court of session than to make an order of discharge, because in his opinion the accused ought to have the benefit of the doubt It would be difficult to state the principle more clearly and satisfactorily than it is there stated That case was followed in more recent days by a most experienced

(1) (1904) I L R, 26 All, 564

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and learned Judge of this Court, who had great experience as a Magistrate himself and as Sessions Judge, and in *Dharam Singh* v *Joti Prasad* (1) Mr. Justice PIGGOTT, following *Fattu* v. *Fattu*, said: "When a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution, he is well within his discretion in discharging the accused" There again is an admirable statement of the legal position. If there had been anything in the Sessions Judge's order in this case which appeared to us to offend against those principles, we think it would have been our duty to have expressed our opinion *obiter* upon the matter As it is, it must be clear to everybody concerned in this case that this question lies at the root of the unfortunate proceedings which we have been compelled to entertain today. But, on the contrary, in accordance with our view the learned Sessions Judge was careful to point out that, without rejecting the evidence as totally untrustworthy and the charge as groundless, the Magistrate had in his view exceeded his jurisdiction, usurped the function of the trial court, interpreted the evidence and given it a legal complexion which to his mind it ought to receive, and as a result had dealt with the matter in a final judgement which he had no right to do

(1) (1915) I L R., 37 All., 355

REVISIONAL CRIMINAL.

Before Mr Justice Banerji.

EMPEROR *v.* ABDUL KARIM

1927 *January*, 4

Criminal Procedure Code, sections 133 and 137—Illegality—Magistrate's order made absolute on the strength merely of a tahsildar's report.

It is not competent to a magistrate, in proceedings under sections 133 and 137 of the Code of Criminal Procedure, to make his order absolute on the mere report of the tahsildar, without going into evidence. *Hingu* v *King-Emperor* (1), *Ismail* v *Bunda* (2), and *Jassi* v *Emperor* (3), followed.

THIS was a reference from the Sessions Judge of Benares. The facts of the case, so far as they are necessary for the purposes of this report, appear from the following order :—

"This is an application in revision against an order of Pandit Raghunandan Upadhiya, Deputy Magistrate, 1st Class, ordering the applicant to vacate a certain plot of land The notice was sent to the applicant on the 4th of August for the 12th of August. On that day the applicant stated that he was a *parjotdar* of Girdhari Lal for the plot in suit The lower court, without going into evidence, but relying on the report of the tahsildar, made his order absolute No notice was sent to Girdhari Lal I am of opinion that the lower court should have gone further into the matter and not passed an order in such a summary fashion. I have been referred to *Hingu* v *King-Emperor* (1), *Ismail* v. *Bunda* (2), and also *Jassi* v *Emperor* (3). On the analogy of the rulings I would recommend that the absolute order of the lower court be set aside and that he should be directed to proceed in accordance

*Criminal Reference No 687 of 1926

(1) (1909) 6 A L J , 685 (2) (1922) 20 A L J . 657

(3) (1922) 20 A L J . 692

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with section 137, Code of Criminal Procedure. The lower court is asked to submit his explanation through the District Magistrate within a week."

Maulvi *Mukhtar Ahmad*, for the applicant

The Assistant Government Advocate (Dr *M. Wali-ullah*), for the Crown.

BANERJI, J —I accept the reference

Reference accepted

REVISIONAL CIVIL.

Before Mr. Justice Ashworth

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January, 5

BABU RAM AND ANOTHER (PLAINTIFFS) *v.* MUNNA LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 115—Revision—Erroneous decision on point of limitation—"Jurisdiction"

It is no ground for revision under section 115 of the Code of Civil Procedure that the court whose order it is sought to revise may have come to an erroneous decision on a point of limitation. *Sarman Lal* v *Khuban* (1), and *Sarman Lal* v *Khuban* (2), followed

THE facts of this case sufficiently appear from the judgement of the Court.

Babu *Satish Chandra Das* and Babu *Surendra Nath Gupta*, for the applicants.

Babu *Saila Nath Mukerji*, for the opposite parties.

ASHWORTH, J. —This is an application in revision against an order of the Munsif of Pilibhit, dated the 20th of May, 1926, setting aside an *ex parte* decree. The present applicants brought a suit against the father of the non-applicant A written statement was filed in the suit by the father, which shows that he must have been served with the summons

* Civil Revision No 96 of 1926

(1) (1894) I L R., 17 All, 422. (2) (1894) I L R., 16 All, 476

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referred to in article 164 of the Limitation Act. The father then died. Presumably the non-applicant was brought on the record as a son of the defendant. He, however, failed to appear on the date fixed for the hearing of the case and a decree was passed *ex parte* against him on the 15th of December, 1925 On the 19th of April, 1926, the non-applicant applied for setting aside of the *ex parte* decree against himself on the ground that, although he was aware of the case against his father being fixed for the 15th of December, he had been under the impression that this date was not for final disposal but merely for bringing his name on the record and reached the court late that day The Munsif wrote the following order on the application for restoration :—

" The suit restored. The applicant to pay Rs 7 as costs, subject to which the case is restored. Fix the 20th of May, 1926, for the final hearing I believe the applicant."

It may be mentioned that the case has never been heard owing to this application against the order of restoration.

The Munsif's order restoring the case is impugned on two grounds One is that the application for setting aside the *ex parte* decree was beyond time under article 164 of the Limitation Act. This appears to be correct but it affords, in my opinion, no ground for revision The plea of limitation presumably was not raised by the present applicant, because no reference is made to it by the Munsif. It must, however, be held that the Munsif's granting of the application on the 1st of May, 1926, amounted to a decision in law that the application was within time. Such a decision, even if wrong, does not fall under either clause (*a*), (*b*) or (*c*) of section 115 of the Code of Civil Procedure. There has been no illegal or irregular exercise of jurisdiction within the meaning

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of clause (c). In *Sarman Lal* v. *Khuban* (1) it was held that it is no ground for revision under section 25 of the Small Cause Courts Act that the court whose order it is sought to revise may have come to an erroneous decision on a point of limitation, and in a Full Bench case, *Sarman Lal* v. *Khuban* (2), it was held that the considerations to be applied to applications under section 622 of the then Code of Civil Procedure, which is now replaced by section 115, were practically the same as those applicable to section 25 of the Small Cause Courts Act. In brief it was held that an erroneous decision on a point of law not connected with the exercise of jurisdiction would not give a right to apply in revision It has been urged by the applicant's counsel that under the law of limitation the court had no power to set aside the *ex parte* decree and, in doing so, it exceeded its jurisdiction This appears to me to be a wrong use of the word jurisdiction I am not aware that it has ever been held that a court wrongly allowing a time-barred application can be said to be acting without jurisdiction In the Privy Council case, *Balakrishna Udayar* v *Vasudeva Ayyar* (3), it is stated that section 115 of the Code of Civil Procedure is not directed against conclusions of law or fact in which the question of jurisdiction is not involved

Another ground taken is that the lower court decided the application merely on the opposite party's statement without requiring him to produce any further evidence. The lower court has stated that it believed that party's statement There is nothing in law to require further evidence in such circumstances.

For the above reasons I dismiss this application with costs

Application dismissed.

(1) (1894) I.L.R. 17 All. 422 (2) (1894) I.L.R. 16 All. 473
(3) (1917) I.L.R. 40 Mad. 793 (799)

Before Mr Justice Ashworth.

MADAN LAL (PLAINTIFF) *v* LAL CHAND (DEFENDANT).*

1927 January, 7.

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 25—Revision—Decision not according to law, but no substantial injustice

There should be no interference by the High Court under section 25 of the Small Cause Courts Act, 1887, unless it clearly appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law or a material error in procedure in the Court of Small Causes *Muhammad Bahar* v. *Bahal Singh* (1), followed

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Shambhu Nath Seth*, for the applicant.

The opposite party was not represented

ASHWORTH, J :—This is an application in revision under section 25 of the Provincial Small Cause Courts Act against a decree of the Small Cause Court Judge of Kasganj, dismissing the plaintiff applicant's suit against the defendant respondent on the basis of a promissory note.

The plaintiff was admittedly the holder of the promissory note, and section 78 read with section 8 of the Negotiable Instruments Act (XXVI of 1881) enacts that such a note can only be discharged by payment made to the holder of the instrument. There can be no doubt that the lower court should not have allowed evidence to show that the promissory note was not really executed in the plaintiff's favour or evidence that the note had been discharged by payment to the person really interested This was held in the Full Bench decision of the Madras High Court, *Subbha Narayana Vathiyar* v. *Ramaswami Aiyar* (2) There

* Civil Revision No 156 of 1926

(1) (1890) I L R, 13 All, 277 (2) (1906) I L R, 30 Mad, 88

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can be no doubt, therefore, that the decision of the suit by the lower court was not according to law

The question, however, arises whether the mere fact of the decision not having been according to law will justify interference in revision. The power to revise conferred by section 25 of the Provincial Small Cause Courts Act is a discretionary power and it has been ruled by a Full Bench decision of this Court, *Muhammad Bakar* v. *Bahal Singh* (1), that there should be no interference under section 25 of the Small Cause Courts Act "unless it clearly appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes." Now, any decree passed on a wrong view of law must cause a substantial injury to a party whose suit is dismissed by reason of that mistake But this injury is not necessarily an injustice In the present case the lower court found that the plaintiff was not entitled in justice to recover the money, as he made no payment to the debtor and as the debtor had paid the real person in consideration of whose loan the promissory note was executed. In these circumstances I am unable to hold that the dismissal of the suit caused a substantial injustice to the applicant. I am bound by the decision of the Full Bench of this Court, referred to above, to hold that section 25 of the Act must not be invoked in the absence of such substantial injustice

Accordingly this application is dismissed, but as no one appears for the opposite party. I make no order as to costs.

Application dismissed.

(1) (1890) I.L.R., 13 All., 277.

Before Mr Justice Ashworth

BAIJNATH PANDE AND ANOTHER (DEFENDANTS) *v.* BABBAN PANDE (PLAINTIFF).*

1927 *January*, 11.

Civil Procedure Code, section 115; *order XXIII, rule* 1—*Order by appellate court permitting withdrawal of suit —Reasons not stated—Revision.*

Except on cogent grounds permission should not be given by an appellate court to a plaintiff appellant to withdraw from his suit with liberty to institute a fresh suit, and whenever such permission is granted the court must state its reasons, in order to enable the High Court, when necessary, to judge whether the lower court exercised a judicial discretion in giving the permission

THIS was an application in revision against an order of the Additional Subordinate Judge of Gorakhpur The facts of the case sufficiently appear from the judgement of the Court

Munshi *Shiva Prasad Sinha*, for the applicants.

Munshi *Kumuda Prasad*, for the opposite party.

ASHWORTH, J. :—This is an application under section 115 of the Code of Civil Procedure by the plaintiff in a suit brought in the court of the Additional Munsif of Deoria. The plaintiff sued Baijnath Pande, the defendant, opposite party, for possession of certain land by the removal of an erection said to have been unlawfully made thereon by the defendant His suit was dismissed for failure to prove that the land belonged to him, the Munsif holding that the evidence and maps were inconclusive. On appeal, in the course of argument, the plaintiff appellant made an oral application to withdraw from the suit with liberty to institute a fresh suit The order-sheet shows the fact of permission being asked but not the grounds on which it was asked, beyond that it was "by reason of legal defects." The appellate court's order fails to set forth the grounds on which permission was given. It is impossible, therefore, for this Court to judge whether the lower court

* Civil Revision No 189 of 1926

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BALNATH PANDE v. BABBAN PANDE

exercised a judicial discretion in giving the permission. Ordinarily permission should not be given by an appellate court except on cogent grounds

Accordingly I allow this application and direct that the order of the lower court granting the permission to withdraw from the suit with liberty to institute a fresh suit be set aside and the case will go back to it with directions to place the appeal upon the file of pending appeals and to dispose of it according to law If the application for permission for liberty to withdraw from the suit with liberty to bring a fresh suit is granted by the court, the court must state its reasons The costs of this application will abide the result.

Application allowed.

Before Mr Justice Ashworth

1927 January, 11

RAJDHARI LAL (OPPOSITE PARTY) v. RAMESHAR LAL (APPLICANT)*

Civil Procedure Code, section 24—Transfer—Criminal Procedure Code, section 476—"Proceeding"

Section 24 of the Code of Civil Procedure cannot be invoked to allow a court other than the court, in the course of proceedings in which a perjury or forgery was committed, or a court to which appeals ordinarily lie from that court, to entertain the question of preferring a criminal complaint The word "proceeding" as used in section 24 of the Code of Civil Procedure can be construed to cover all proceedings contemplated at the date when the Code of Civil Procedure was passed but not a special proceeding not then in contemplation but established by a subsequent Act, namely, the Criminal Procedure Amendment Act, 1923. *Banwari Lal* v. *Jhunka* (1), referred to

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

* Civil Revision No 161 of 1926.
(1) (1925) 24 A L J , 217

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RADHEY LAL v. RAMESHAR LAL

Munshi *Kumuda Prasad*, for the applicant

Mr. *Nihal Chand*, Mr *G. W. Dillon* and Babu *Indu Bhushan Banerji*, for the opposite party.

ASHWORTH, J. :—This is an application in revision under section 115 of the Code of Civil Procedure impugning an order, dated the 30th of October, 1926, passed by the District Judge of Ghazipur The order in question is one purporting to be passed under section 24 of the Code of Civil Procedure, transferring a pending proceeding on an application to the Munsif of Saidpur, made under section 476 of the Code of Criminal Procedure, that the Munsif should make a complaint against a party to a suit on a charge of forgery. The order directs that the proceeding should be transferred to the Subordinate Judge of Ghazipur.

The applicant contends that section 476 of the Code of Criminal Procedure only contemplates a proceeding under section 476 being conducted by the court wherein the forgery was committed or a court to which appeals from that court ordinarily lie. It is admitted by the counsel for the opposite party that appeals do not ordinarily lie to the Subordinate Judge from the Munsif, but he urges that under section 24 of the Code of Civil Procedure the District Judge, independently of section 476 of the Code of Criminal Procedure, had power to transfer the proceeding from the court of the Munsif

It cannot be denied that, according to the decision of this Court in *Banwari Lal* v. *Jhunka* (1), the proceeding under section 476 is to be regarded as a proceeding by a civil court Nor is there any restriction placed on the power of transfer conferred by section 24 of the Code of Civil Procedure in respect of proceedings. The only question is whether section 24 of

(1) (1925) 24 A L J , 217

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the Code of Civil Procedure can apply to a proceeding of a civil court arising out of the power conferred on a civil court by section 476 of the Code of Criminal Procedure In my opinion section 476 of the Code of Criminal Procedure must be construed as self-contained and exhaustive, in respect of the matter of a court making complaint against litigants on the ground of perjury or forgery. I construe the word "proceeding" in section 24 of the Code of Civil Procedure to cover all proceedings contemplated at the date when the Code of Civil Procedure was passed and not to cover a special proceeding not then in contemplation but established by a subsequent Act, namely, the Criminal Procedure Amendment Act (XVIII of 1923). It is perfectly clear from the terms of section 476 of the Code of Criminal Procedure that the legislature did not intend the power of making a complaint conferred by this section to be exercised by anyone but the court before whom the offence has been committed or a court to which appeals from that court ordinarily lie It must be deemed to exclude such a court as that of the Subordinate Judge, on the principle that general provisions cannot override special provisions. I hold that section 24 of the Code of Civil Procedure cannot be invoked to allow a court other than the court, in the course of proceedings in which a perjury or forgery was committed, or a court to which appeals ordinarily lie from that court, to entertain the question of preferring a criminal complaint

In any case it appears to me very undesirable to pass such an order of transfer. Section 476 appears to me to contemplate that ordinarily the court to prefer the complaint shall be the original court which heard the case and that an appellate court should only

make a complaint when the suit has been up before it on appeal or when the original court has granted or refused a complaint and its order is appealed from to the appellate court It was not intended by the legislature that while proceedings were going on before the original court the appellate court should step in and deal with the matter. The district court, apart from its powers as an appellate court under section 476B, can only consider the desirability of itself preferring a complaint, if there is some *primâ facie* ground for its so doing Such *primâ facie* ground will not exist if the original court is considering the matter, and certainly will not exist if, as in the present case, the appellate court has no reason to believe that sanction should be granted

In the present case it would appear sufficient for the District Judge to direct the Munsif to conclude his proceeding without delay Then if the Munsif decides to make a complaint, the present applicant can appeal to the District Judge.

For the above reasons I allow this application, but, in the circumstances, I make no order as to costs.

Application allowed.

APPELLATE CIVIL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Banerji

1927 January, 12

SHEO PRASAD, RAM PRASAD (DEFENDANT) *v* GOBIND PRASAD AND OTHERS (PLAINTIFFS) *

Act No I of 1872 (Indian Evidence Act), section 92—Act No. XXVI of 1881 (Negotiable Instruments Act), section 46—Admissibility of evidence—Promissory note—Evidence to show that note was given subject to certain conditions

Evidence to show that an instrument like a promissory note, the title to which generally passes by delivery, was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein, is not only admissible but is precisely the class of evidence contemplated by the provision in section 46 of the Negotiable Instruments Act and in section 92 of the Indian Evidence Act. *Sri Ram* v *Sobha Ram Gopal Rai* (1), dissented from. *New London Credit Syndicate* v. *Neale* (2), followed

There is no difference in substance, but only in illustration and application, between the provision in section 46 of the Negotiable Instruments Act and proviso 3 to section 92 of the Indian Evidence Act

THE facts of this case are fully stated in the judgement of the Court.

Babu *Piari Lal Banerji* and Pandit *Narmadeshwar Prasad Upadhiya*, for the appellant

MR. *G W Dillon* and Sir *Tej Bahadur Sapru*, for the respondents

WALSH, A C J , and BANERJI, J —This is a second appeal which raises a very nice point of evidence, or rather the admissibility of evidence, a point which is constantly arising in various forms,

* Second Appeal No 1916 of 1925, from a decree of A G P Pullan, District Judge of Moradabad, dated the 21st of May, 1925, confirming a decree of Hanuman Prasad Varma, Subordinate Judge of Bijnor at Moradabad, dated the 29th of September, 1923

(1) (1922) I L R , 44 All , 521 (2) (1893) 2 Q B , 487

and about which there is really a good deal of authority, both in the English reports and in the Indian reports.

The appeal is brought by the defendant, whose defence has in substance been struck out, on the ground that he has not been allowed to prove his real case, because it has been held against him that his real case consists of evidence which is rendered inadmissible by section 92 of the Indian Evidence Act. Inasmuch as the learned District Judge, who is now a member of this High Court, followed a reported decision, which seemed to be in point, by two Judges of this High Court which was undoubtedly binding upon him, he naturally decided in the way that he did. We are not making any complaint,—and the existing practice is perhaps intelligible—but as a matter of fact it is extremely embarrassing to have to decide the admissibility, or otherwise, of a fundamental piece of evidence, tendered in support of defence, when one has only the vaguest idea as to what that evidence is It is not only embarrassing, but also dangerous to the parties, because if the court of appeal is compelled to interfere and order either a new trial, or further evidence to be taken, there is great temptation to the party tendering the evidence, so to frame his evidence as to fit it into the propositions which have been extracted from the court of appeal It is perhaps necessary, therefore, to utter a word of warning to the court which will have to take the evidence again in this matter, that a substantial variation from the original statements tendered, or attempted to be made, at the first hearing, should be regarded with suspicion: but at the same time it is desirable to utter a warning that that suspicion ought not to be allowed to rest upon evidence which is additional and is really only developing the point which the defendant all

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along desired to make. A further warning seems necessary, owing to the old complaint of the lack of training in precise pleadings, and the vague and inartistic way in which pleadings are allowed to pass muster in these provinces, it would be unjust, as this Court has said scores of times, to apply a rigid standard of scrutiny to a pleading which, however clumsily, was really endeavouring to set up the real defence, and is not flagrantly inconsistent with the story which the party attempts to support by his evidence. In a case of this kind it is true to say that, whatever instructions are given to the pleader in the initial stages of the case, when the pleadings have to be framed, nobody really knows what the case of either side is until the matter comes into court, and, as a matter of strict justice, the fault, where the court has to deal with a vague and clumsy attempt in a pleading to set up a definite defence, is not entirely on the shoulders of the defendant and his pleader. The law has, for excellent reasons, and as the result of long experience, provided machinery by which the other side, if there is doubt, prolixity, or vagueness about the pleading, may apply to the court for an order for particulars, and the plaintiff in this case could undoubtedly have applied to the court to direct the defendant to give further and better particulars of the defence sought to be set up under paragraph 3 of the further pleas. We recognize, however, that this machinery, valuable though it is for the purpose of clearing ground before the parties come into court, is almost wholly ignored in the proceedings of the trial courts, and little or no notice is taken of it until the unfortunate court of appeal is asked to disentangle the knot into which the case has tied itself for lack of adequate preparation.

The question of law which we have to determine, turns upon the true application of two sections of the codified law, and we think we should be doing less than our duty, indeed we have no right to interfere with this decision at all, without expressing our disagreement with the legal position which has been taken in the matter up to this moment, giving our reasons for so doing, and stating what we believe to be the law applicable to the evidence. The two sections are section 46 of the Negotiable Instruments Act and section 92 of the Indian Evidence Act. Possibly, owing to the unfamiliarity of the ordinary courts with cases relating to bill transactions, the point has been discussed in the case before us, and other authorities which have been cited, as depending solely upon section 92 of the Indian Evidence Act. There is really no difference in substance between the two provisions, but at any rate in English business transactions the question arises far more often in relation to negotiable instruments, or promissory notes, than in relation to any other documents, and is easier to expound and easier to apply in relation to such documents. It must be borne in mind that the liability in relation to a promissory note, or negotiable instrument, attaches by or from delivery, and section 46 of the Negotiable Instruments Act provides that as between the parties to an instrument (that means to say, the immediate parties) it may be shown that the instrument was delivered conditionally, or for a special purpose only, and not for the purpose of transferring absolutely the property therein. There really should be no difficulty in applying this simple provision. A note is sometimes given as, what is described as, collateral security The term "security" is misleading, because a note of hand convevs no higher security than the personal liability of the

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executant—but it is a collateral liability, and arms the creditor with conclusive documentary evidence of the loan, for the recovery of which nonetheless he might sue even if he had no document at all, and in a case in which *A* lends *B* a thousand on a verbal promise to repay on demand, and a day or two afterwards *B* gives *A* a promissory note for a thousand, as what is called "collateral" security, it is clear law that if after *B* repaid the thousand to *A*, *A* put the promissory note in suit, it would be open to *B* to set up the true story under section 46, and to show that he gave the promissory note conditionally, or for a special purpose only, namely, as a document on which the plaintiff could sue in the event of *B* failing to pay the loan or fulfil his verbal promise Another illustration is that of a signature upon a bill given by a guarantor. A guarantor, or surety, is always able under section 46 to show that he put his name upon the bill merely as a guarantor for the debtor originally liable, and received no consideration, and that may be a matter of the utmost importance, because a surety has defences open to him which are not open to the debtor. If the creditor gives the debtor unreasonable time for payment, so that the position of the surety is altered, the surety may set up in defence that he is discharged by the creditor having given time to the debtor, and he could not do that unless he could show under this section that he signed only in the capacity of a surety. In the great majority of cases nobody can tell by looking at the bill whether the names are the names, for example, of three joint debtors, or of three persons who have accepted different liabilities. Similarly, it may be shown that the instrument was delivered conditionally, that is to say, as a collateral undertaking, given to the creditor, to be enforced only in the event of the debtor failing

to discharge some contemporaneous undertaking. There is, as we have said, no difference in substance, but only in illustration and application, between the provision in section 46 of the Negotiable Instruments Act, and proviso 3 to section 92 of the Indian Evidence Act. Proviso 3 of section 92 of the Indian Evidence Act runs as follows :—

"The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract may be proved."

Applying that to the illustrations which we have given, and bearing in mind that the attaching of an obligation under the Negotiable Instruments Act is delivery, it is quite consistent with section 92 of the Indian Evidence Act that the signatory to a bill should be able to prove by oral evidence that the condition precedent at the time of the making of the bill, or the delivery of the bill, was that it should merely be a record of a collateral liability against the failure of some other undertaking.

Applying these considerations to the defence set up in this case, it appears to us, after hearing such evidence as the defendant gave, not apparently in the ordinary course of the trial, but under the exceptional procedure of an examination conducted by the court itself by way of anticipation, and the wholly vague allegation in paragraph 3 of the defence, that the defendant desired to prove, or was attempting to prove that the promissory note in question was not the substantive liability such as it would be if given for a loan, or for the payment of the price of goods sold and delivered, but was a collateral undertaking, or recognition of liability arising out of another contract in the nature of a partnership transaction under which the defendant had become answerable to the plaintiff for the sum of Rs. 2,100, set out in

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the note, which represented the plaintiff's share of the capital in the partnership when the partnership came to be dissolved.

The defendant's statement to the court, roughly, was that he had bought or entered into a bargain and sale for the purchase of certain springs in Lahore some time in May and that, being unable to put up the whole amount of the price, which, of course, would be the working capital in the business of selling these springs and iron things at a profit, he approached certain persons to come in as partners He had deposited, he says, a thousand rupees to bind the bargain and to secure delivery, and had secured a person named Maula Bakhsh to come in as a partner, and presumably to provide capital The story was very sketchily told, and was not extracted from him by anybody. He went on to say that the plaintiff joined in the spring transaction only for Rs. 2,100 He gave the plaintiff no receipt. It only appeared in his account books, but either at the request of the plaintiff, or in the ordinary course of events, as would be expected between two business men, it was considered right that the plaintiff should have some document which he could use as what we have described as a collateral security, or which he could produce as conclusive evidence of his share in the partnership capital or which, when dissolution came and there were substantial profits to be divided, he could tender as the mark of his claim in the distribution. The defendant distinctly stated, if he meant what he appears to have said, that the promissory note was executed by him, which means given to the plaintiff, to repay the sum of Rs 2,100 which the plaintiff had paid towards the total sum necessary for purchasing the goods through him, the defendant, who was conducting the negotiations for their purchase and delivery from Lahore. We have not the

slightest hesitation in holding that such evidence is not only admissible, but is precisely the class of evidence contemplated by the provision, which we have only partly cited, in section 46 of the Negotiable Instruments Act, and in proviso 3 of section 92 of the Evidence Act. We might emphasize an expression in section 46, to which we have not hitherto adverted, namely, that it may be shown that the instrument was delivered not for the purpose of transferring absolutely the property therein. It is a significant feature of the evidence and cannot be altered as the result of any observation which we make in this judgement, that the defendant alleged that he deposited the money necessary for securing the goods in Lahore on the 21st of June, 1921 That may not be so, but it is a significant fact that the promissory note in question is dated the 15th of June, that is to say, before the actual liability of the defendant towards the plaintiff in the partnership transaction had become crystallized The moment the money was handed over by the plaintiff to the defendant, the defendant became entitled to restore it if the transaction fell through; but, if the transaction went through, the plaintiff would have no claim upon the defendant until the partnership was dissolved, and it does seem to support the defendant's case, with regard to the preliminary deposit of the money in Lahore and the negotiations for the purchase which were taking place there, that the promissory note should have been dated the 15th of June.

The courts below followed the decision of a two-Judge Bench of this Court, *Sri Ram* v. *Sobha Ram Gopal Rai* (1). No arguments are set out in the report, and section 46 of the Negotiable Instruments Act was not even referred to. We doubt whether we

(1) (1922) I L R, 44 All, 521

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should have come to the same decision as that Bench did on that occasion, but we desire to make it plain how we think authorities, which seem to be inconsistent with the view which we take, ought to be dealt with The point of law, as we have said, in this case is clearly statutory We have no authority to vary the language of the statute, or to attempt either to alter or defeat its plain meaning. We have to apply it There are cases where ambiguous expressions in statutes give rise to fundamental differences of opinion But where an authority is cited merely as an illustration of a particular application of language in a statute, which is not in dispute, one can only say that a decision in such a case is not necessarily binding in another case Circumstances alter cases, and we hold that we are free to apply what we understand to be the plain English of the statute to the circumstances of this case, without regard to the fact that in another case a Bench of this High Court applied the same language to circumstances apparently similar in a different way Whether these observations would be any assistance to any subordinate court, which was invited to decide or distinguish between the decision we are giving today and the decision in the case referred to above, we are unable to say, and, therefore, we will go this much further and say that if there is pronounced inconsistency between our decision and that decision, we do not hesitate to say that that decision was not correct If anybody should feel a difficulty in applying the provisions of these two sections, he cannot do better than study the decision in *New London Credit Syndicate* v. *Neale* (1) The law in England and the law in India in this matter does not differ There was a bill of exchange for £110 There the contention was that, at the time the bill was accepted, an oral

(1) (1898) 2 Q B. 487

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agreement was made, and was relied upon by the defendant, that if the defendant could not meet it at maturity, the drawers would renew it. The first observation is that that defence appears to be an attempt to vary the terms. The internal provisions of the bill were that it should be payable on a certain date, and an oral agreement that it should not be payable on that date but some other looks very much like an attempt to vary the substance of the bill The importance of the case is that Mr. Justice DARLING, who tried it, believed the defence Whether the evidence was objected to or not.—it probably was, —it was received and acted upon by the learned Judge. He held that the defendant's story was true and that the negotiation of the bill by the holders, which, of course, would put it in the hands of a third party, who could sue upon it, was in breach of good faith and a trick upon the defendant, having regard to the agreement that it should be renewed at maturity. The point of law, therefore, arose in the most concrete form. There was a finding by an experienced Judge that the defence was true. and that the plaintiffs had agreed not to negotiate the bill, not to enforce it, but to renew it at the date of maturity; and, therefore. if that evidence which was accepted. was admissible by law the plaintiff's suit failed. the old cases were cited in argument. including *Pym* v *Campbell* (1), and the Court of Appeal held that it was inadmissible, because it was an attempt to vary the liability The case is valuable because it contains two clear statements by two great commercial lawyers. which enable anybody who takes the trouble to study them. to guide his course without possibility of mistake. Lord Justice A L SMITH said, at page 490 :

" If the evidence be to the effect that the document is only delivered as an escrow " (which means

(1) (1856) 6 E & B. 370

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to say, a provisional liability) "or that it is not to take effect as a contract until some condition is fulfilled, it is admissible But that is not this case"

Lord Justice VAUGHAN WILLIAMS, on the next page of the report, said this:

"For lawyers practising under the old system of pleading there was a convenient test in these cases as to whether the oral evidence, which it was sought to give, was admissible If the evidence were such as would support a plea of the general issue in an action of contract, like *non est factum*, that is to say, if it amounted to showing that, though the defendant signed the instrument, he signed on the understanding that it should not be an effective instrument until some condition was fulfilled, then it was admissible."

If in this case the truth really is that the defendant gave this promissory note on the understanding that it should be an effective instrument if and when the liability arose upon his part to restore to the plaintiff his share of the capital, that evidence would, in accordance with that exposition of the statute law in India, be admissible

We would only repeat that the court to which we propose to refer the issue will, of course, in taking the additional evidence which will be necessary, do so with great care and be careful to see that in substance advantage is not taken of this decision by the defendant and his witnesses to trim their case according to what they now understand to be the admissible aspect of it in the view of the law. We think that on the whole it would be to the interest of the parties if we retain control of the case, and, therefore, we refer an issue to the lower appellate court under order XLI, rule 25 We direct the following alternative issues: (1) Was the promissory note in suit given to the plaintiff in discharge of an existing debt for past consideration or for the purpose of transferring absolute property

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therein to the plaintiff, or (2) was it given as a collateral security or undertaking only to be enforced if and when the defendant became liable to refund or pay to the plaintiff the sum of Rs 2,100 as the result of their joint undertaking? The parties will be at liberty, of course, to give further evidence and the usual ten days will be allowed for objections, and the Judge will be at liberty, if he finds himself unable on a consideration of the whole evidence, to answer either of these issues definitively, to set out in a separate statement what he believes to be the true facts

Issues remitted.

REVISIONAL CRIMINAL.

Before Mr Justice Iqbal Ahmad

TIRKHA AND ANOTHER *v.* NANAK AND ANOTHER *

1927 *January*, 18

Criminal Procedure Code, sections 133, 137(1), 537(a) 539B *—Conditional order made absolute without recording evidence—Illegality—Local inspection—Memorandum of relevant facts observed at a local inspection to form part of the record*

A Magistrate cannot make an order under section 133, Code of Criminal Procedure, absolute without recording evidence and simply on the basis of a local inspection made by him. *Ismail* v. *Bunda* (1) and *Ramohan Karmakar* v. *Emperor* (2), followed.

A local inspection by a Magistrate is only permitted by section 539B of the Code of Criminal Procedure, for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself. *Ram Sahai Singh* v. *Dwarka Singh* (3), followed

Section 537 of the Code of Criminal Procedure applies only to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law. The section does

* Criminal Reference No 20 of 1927

(1) (1922) 20 A L J, 657 (2) (1916) I L R, 44 Calc, 61

(3) (1920) 61 Indian Cases, 712

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not apply to cases of disregard of or disobedience to mandatory provisions of the Code *Subrahmania Ayyar* v. *Emperor* (1), followed.

THIS was a reference from the Additional Sessions Judge of Meerut The facts of the case are fully set forth in the judgement of the High Court.

The parties were not represented.

IQBAL AHMAD, J —This is a reference made by the learned Additional Sessions Judge of Meerut under section 438, Code of Criminal Procedure, recommending that the order of a Magistrate of the first class, dated the 1st of November, 1926, by which he made absolute a conditional order under section 133 Code of Criminal Procedure, directing the removal of a portion of a certain *chabutra*, be set aside, and the case be sent back for trial according to law.

The case was started on the complaint of the opposite party The allegation in the complaint was that the petitioners had built the *chabutra* complained of and that the *chabutra* obstructed a certain pathway and caused inconvenience to the people using the pathway and might lead to the falling of the neighbouring houses during the monsoons.

The complaint was filed on the 8th of May, 1926, and it was not until the 23rd of September, 1926. that an inquiry into the case commenced. On that date the petitioners appeared and denied that they had blocked the way as alleged by the complainants The case was then taken up on the 30th of October, 1926, and on that day the complainants did not offer to produce any evidence. The petitioners thereupon stated that they had no evidence to produce either, and it appears that the learned Magistrate was asked to inspect the locality and then to decide the case.

(1) (1901) I L R, 25 Mad, 61

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An inspection was made by the learned Magistrate on the 31st of October, 1926, and, on the day following, the learned Magistrate passed the order now in question.

The petitioners having shown cause against the conditional order made under section 133 Code of Criminal Procedure, the learned Magistrate was bound to follow the procedure laid down by section 137(1) of the Code of Criminal Procedure. In other words, the learned Magistrate was bound to take evidence in the matter as in a summons case This the learned Magistrate did not do The learned Additional Sessions Judge is perfectly right in observing that the failure of the Magistrate to follow the procedure enjoined by section 137(1) Code of Criminal Procedure, vitiates his order, and is not a mere irregularity of the nature contemplated by section 537 (*a*) of the Code of Criminal Procedure It has been pointed out in numerous cases that section 537 Code of Criminal Procedure, applies only to mere errors of procedure arising out of mere inadvertence, and not to substantive errors of law, and that that section does not apply to cases of disregard or disobedience of mandatory provisions of the Code The section has not the effect of curing material irregularities and absolute illegalities "The errors which can be cured by the section are formal defects of procedure and not substantive errors of law," vide *Subrahmania Ayyar* v. *Emperor* (1) It has been held in the case of *Ram Sahai* v *Durarka Singh* (2) that if a Magistrate makes use of knowledge derived from a local inspection, without affording the accused an opportunity to cross-examine or to explain the points against him, he acts with material irregularity sufficient to vitiate the trial. The provisions of

(1) (1901) I L R , 25 Mad , 61 (2) (1920) 61 Indian Cases, 712

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section 137(1), Code of Criminal Procedure, are imperative and the failure of the Magistrate to follow the same vitiates the entire proceedings.

But the matter does not stop there. The learned Magistrate, in disregard of the provisions of section 539B, Code of Criminal Procedure, did not record a memorandum of any relevant facts observed by him at the time of inspection nor did he put on the record any such memorandum In this respect the learned Magistrate was clearly wrong. The learned Magistrate in his explanation says that he did prepare rough pencil notes at the time of inspection which he destroyed after writing his order. I can discover no justification for this procedure of the learned Magistrate and I must say that it is an action that I can hardly expect from a Magistrate of the first class. A local inspection by a Magistrate is only permitted by section 539B, Code of Criminal Procedure, for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself. As was pointed out in the case of *Ram Sahai Singh* v *Dwark Singh* (1),—

" a local inspection by a Magistrate must be held sparingly and for the purpose of elucidating and understanding the evidence in the case and it should never be substituted for evidence in the case The party against whom the result of the local inspection is used, is greatly prejudiced and is put to an irreparable disadvantage in not being able to remove the wrong impression from the mind of the Magistrate by cross-examining him."

A Magistrate cannot make an order under section 133, Code of Criminal Procedure, absolute without recording evidence and simply on the basis of a local inspection made by him, vide *Ismail* v *Bunda* (2) and *Raimohan Karmakar* v. *Emperor* (3)

(1) (1920) 61 Indian Cases, 712
(2) (1922) 20 A L J, 657
(3) (1916) I L R, 44 Calc., 61.

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For the reasons given above I set aside the order of the learned Magistrate, dated the 1st of November, 1926, and order that the case be sent to the learned District Magistrate of Muzaffarnagar with a direction that either he should try the case himself or send the case for trial to some Magistrate other than the Magistrate who passed the order, for trial according to law.

Order set aside

Before Mr. Justice Ashworth.

SHER SINGH v. AMIR KUNWAR *

1927 January, 15

Criminal Procedure Code, section 488, clause (9)—Jurisdiction —"Resided"

A stay of two months in a temporary place of residence with occasional visits during that period to the permanent place of residence can be regarded as amounting to a "residence" within the meaning of section 488 of the Code of Criminal Procedure.

The expression "resided" in clause (9) of this section includes a temporary residence and is not to be confined to permanent residence

Ramdei v. *Jhuum Lal* (1) and *Flowers* v. *Flowers* (2), distinguished

THIS was a reference by the Sessions Judge of Agra. The facts of the case are fully set forth in the judgement of the High Court

The parties were not represented

ASHWORTH, J.:—This case arises out of a reference by the Sessions Judge of Agra under section 435, Code of Criminal Procedure, asking this Court to interfere in exercise of its power under section 439, Code of Criminal Procedure, with an order of a Magistrate of the first class of Agra, dated the 6th of

* Criminal Reference No. 3 of 1927

(1) (1928) A I R. (Oudh), 268 (2) (1910) I L R., 32 All., 203

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SHER SINGH v. AMIR KUNWAR

September, 1926, requiring one Sher Singh (applicant before the Judge) to pay Rs 75 per mensem as maintenance to Musammat Amir Kunwar (opposite party before the Judge).

The facts are as follows —The parties are husband and wife Up to March, 1925, they lived at Bhatgaon, Rohtak, Punjab In that month they came to Jarauli, in the Agra district, on a visit to the father of Sher Singh's daughter-in-law. They stayed here for a period of two months, during which period Sher Singh occasionally visited his home in Bhatgaon At the end of these two months Sher Singh deserted his wife and returned to the Punjab.

The Magistrate, on an application by the wife under section 488, Code of Criminal Procedure, has ordered Sher Singh to pay her maintenance The Sessions Judge is of the opinion that a Magistrate of Agra had no jurisdiction because Sher Singh, at the time of the filing of the application under section 488, neither resided in Agra nor was in Agra, and because he could not be said to have last resided with his wife in Agra The Sessions Judge relies upon a decision of the Chief Judge of the Oudh Chief Court in *Ramdei* v *Jhunni Lal* (1). This decision held that a stay in a place for a week by a person having a fixed place of residence elsewhere does not constitute residence in that place The decision was based on a Full Bench decision of the Allahabad High Court in *Flowers* v. *Flowers* (2), where the expression "residence" as used in section 3 of the Indian Divorce Act, 1869, was held not to apply to a flying visit to a place for a temporary purpose made without any intention of remaining

There can be no question of the correctness of the Allahabad decision on the facts A flying visit for

(1) (1926) A I R (Oudh), 268 (2) (1910) I L R, 32 All, 203

the purpose of attending business in connexion with a lodge of freemasons cannot amount to residence In the Lucknow case also the decision would appear to me to be sound In that case the husband, who deserted his wife, brought her (his wife) to the house of her brothers in Lucknow in order to leave her there This could not be called residence of husband and wife The facts in the present case are different The husband and wife had been in Agra for two months. During that time the husband had gone back to his permanent residence once or twice but had returned to Agra There can be no question that a person can have two residences. He may have a permanent place of residence and a temporary place of residence The point at which a visit or a stay becomes capable of being held to be residence is one that is difficult to define In the present case I consider that a stay for two months in a temporary place, with occasional visits in that period to the permanent place of residence, should be regarded as amounting to temporary residence sufficient within the meaning of section 488 The expression "resided" in clause (9) of that section, in my opinion, will include a temporary residence and is not to be confined to permanent residence

With these remarks the case may be returned to the Sessions Judge and the application of Sher Singh in revision will stand dismissed

Application dismissed

Before Mr Justice Dalal.

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EMPEROR *v* JANKI RAI

Act No XLV of 1860 (Indian Penal Code), section 199—Written statement—Civil Procedure Code, orders VI, VIII, X and XIX

A defendant cannot be convicted under section 199 of the Indian Penal Code simply on account of a statement made by him in a written statement filed under order VIII, rule 1, of the Code of Civil Procedure *Chandi Prasad* v. *Abdur Rahman* (1), referred to.

THIS was an application for revision of an order of the Sessions Judge of Azamgarh. The facts of the case are fully set forth in the judgement of the High Court.

Dr *M. L. Agarwala*, for the applicant

The Assistant Government Advocate (Dr *M Walli-ullah*), for the Crown

DALAL, J.:—This is an application in revision from the judgement of a learned Sessions Judge upholding the applicant's conviction under section 199 of the Indian Penal Code The facts are admitted, as they must be, here by the applicant's learned counsel, Dr. *Agarwala*. He raised a point of law that on those facts no offence was committed under section 199

In a suit for sale against a Hindu father and his sons the father filed a written statement to the effect that the money was borrowed for the benefit of the plaintiff's father, who was a brother of the applicant. The written statement was verified, as required by the provisions of order VI, rule 15, but the court had not ordered proof of the statements made therein by affidavit, as it had power to do under order XIX,

* Criminal Revision No 702 of 1926, from an order of Syed Abdul Hasan, Sessions Judge of Azamgarh, dated the 20th of October, 1926

(1) (1894) I L R, 22 Calc, 181

rule 1. Under the circumstances, the question before this Court is whether the written statement falls within the terms of section 199 which makes punishable any declaration which any court of justice is bound or authorized by law to receive as evidence of any fact. A written statement is a pleading under order VI, which describes how pleadings are to be prepared. Order VIII, rule 1, lays down that a defendant may present a written statement of his defence. After the written statement is filed, the court ascertains from each party or his pleader admission or denial of allegations of fact made in the plaint or written statement. This is provided for in order X, rule 1. These admissions or denials are the basis of issues to be framed by the court. The Civil Procedure Code does not provide that statements in written statements are to be received as evidence. The pleadings lay down the points of difference between the parties which have to be decided by the court on evidence to be recorded subsequently It is for this reason that the importance of recording the evidence of parties is constantly pointed out to civil courts. In the present case, as in the majority of cases, the court did not proceed to record the statement of the applicant. If the applicant had repeated on oath the statements of the written statement which had been found to be false, he would have rendered himself liable to prosecution under section 193. Under section 21 of the Indian Evidence Act, a court is bound to receive in evidence admissions of a party, but no such rule applies to denials. In my opinion an allegation in a written statement is not evidence of any fact, which a court is bound or authorized by law to receive. Dr. *Agarwala* referred the Court to a ruling of the Calcutta High Court in *Chandi Pershad* v. *Abdur Rahman* (1). The accused person made a declaration

(1) (1894) I.L.R., 22 Calc., 131

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to a Municipality as prescribed by statute in order to obtain a licence for horses and conveyances. In that case the learned Judges held that a prosecution under section 199 would not be tenable on the ground that the statement made by the accused in that case was no evidence at all against anyone but himself and could only be evidence against himself as proving an admission by him and no more

I set aside the conviction and sentence, and order the applicant to be released at once if he is in jail and direct the fine, if recovered, to be refunded. If he has given a bond, it shall be cancelled

Conviction set aside.

Before Mr. Justice Dalal

EMPEROR v. TORPEY *

1927 *January*, 17

Act No XLV of 1860 (Indian Penal Code), section 341—Criminal Procedure Code, section 345(1)—Composition of offence.

An offence under section 341, Indian Penal Code, may be compounded without the permission of the court under section 345 (1) of the Code of Criminal Procedure It is, therefore, unnecessary that a composition should be arrived at after a complaint has been filed in court. *Kumaraswami Chetty* v *Kuppuswami Chetty* (1), referred to

THIS was an application in revision against the order of a magistrate at Allahabad The facts of the case sufficiently appear from the judgement of the High Court

Babu *Sailu Nath Mukerji*, *for* the applicant

Babu *Aditya Prasad Bagchi*, for the opposite party.

The Assistant Government Advocate (Dr *M. Wali-ullah*), for the Crown

* Criminal Revision No 720 of 1926, from an order of Raj Narain, empowered as District Magistrate of Allahabad dated the 25th of October, 1926.

(1) (1918) I L R, 41 Mad, 685

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EMPEROR v. TORPEY.

DALAL, J. :—Mrs. Torpey, manager of a local hotel, has applied in revision from a conviction under section 341 of the Indian Penal Code. Apart from anything else, interference would be necessary, because the order of the lower court is contrary to law. She was convicted of two offences, under sections 379 and 341, and a sentence of fine was imposed The appellate court set aside the conviction under section 379, but still upheld the same order of fine. This amounted to an enhancement of the sentence imposed by the trial court and was contrary to the provisions of section 423 (1) (*b*) of the Code of Criminal Procedure

The point taken by Mr *Saila Nath Mukerji* is that the offence under section 341 was compounded It appears that the complainant, Mr. Barker, was considered by the applicant to be an unprofitable visitor at her hotel, and she desired that he should depart. As an amicable settlement was not arrived at, on the afternoon of the 28th she put a lock on his room and directed her servants to prevent his entering into the compound. Obviously Mr Barker was a person not likely to submit tamely to such a treatment and he sought the help of the police. The parties finally went to the Superintendent of Police, Mr Hollins, and it was agreed there that if Mr. Barker left the hotel that night, Mrs Torpey would not only remit the entire sum due from him for board and lodging up to date, but would pay him a sum of Rs. 10 Mr Hollins thought that eviction at 10 o'clock at night would be hard on Mr. Barker, so he got the parties to agree to the terms that Mr. Barker should leave on the afternoon of the 29th and Mrs Torpey, in consideration thereof and her past conduct, should forego her bill The complainant admitted in his cross-examination that there was a compromise that he should leave on

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the 29th in the afternoon and no dues would be charged. The lower appellate court refused to accept the compromise on the ground that the complaint was filed subsequent to the alleged compromise and not prior thereto. An offence under section 341 may be compounded without the permission of the court under section 345(1) of the Code of Criminal Procedure. It, therefore, does not seem to be necessary that a composition should be arrived at after a complaint has been filed in court. The words of the section are—"The offences punishable under the sections of the Indian Penal Code specified in the first column of the table next following may be compounded by the persons mentioned in the third column of that table." An offence of wrongful restraint is compoundable by the person restrained. This appears to be the view suggested by the wording of the section and is supported by a Bench ruling of the Madras High Court in the case of *Kumaraswami Chetty* v. *Kuppuswami Chetty* (1) The learned Judges there observed: "An offence is complete when the acts constituting it have been committed, apart from whether any complaint or charge has been laid before the court or not The allusion to the 'accused' in paragraph 6 of section 345 only describes his character at the time of the trial, when the question of the effect of the composition is under consideration." I hold that there can be a composition of the present offence prior to a complaint.

Another point was also made by Mr. *Saila Nath Mukerji* on behalf of the applicant that prior to this agreement between the parties there had already been a complaint at the police station, and as an offence under section 341 is a cognizable offence, the police was competent to receive the complaint. From that

(1) (1918) I.L.R. 41 Mad. 635

point of view the composition may be said to have taken place subsequent to the complaint and proceedings by Mr. Barker.

The respondent's learned counsel pointed out that Mrs. Torpey did not comply with the terms of the composition and on the evening of the 29th retained the goods of Mr. Barker for lien of a bill. This matter, however, is not so simple as it is stated to be In spite of the composition Mr. Barker lodged a complaint in the criminal court and there was some trouble as to whether he should give a receipt for the property or not. It appears that those are points still to be settled in a civil suit. Mr. *Saila Nath Mukerji* has declared in court that Mrs Torpey has remitted all the sums due to her for board and lodging of Mr Barker. This statement is sufficient as an acceptance by Mrs. Torpey of the terms of the compromise, and on this understanding I hold that the composition was carried into effect.

The result of the composition is an acquittal, so I set aside the conviction and sentence passed by the appellate court and direct that the fine, if any recovered, shall be refunded.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr Justice Sularman.

1927 January, 18

KALYAN (DEFENDANT) *v.* DESRANI (PLAINTIFF) *

Act (Local) No. XI of 1922 *(Agra Pre-emption Act)—Act No. IV of* 1882 *(Transfer of Property Act), section 54—Sale—Pre-emption—Transfer of a right which has to be established by litigation—Sale consideration being an unascertained sum to be spent as costs of future suit*

A Hindu widow, in possession as such of her late husband's property, sold the same On the death of the widow the nearest reversioner, not having enough money to sue for the recovery of the property, sold his interest in a portion of it, the consideration being that the vendee undertook to pay the costs of a joint suit to recover the property from the hands of the widow's transferee A suit was brought, but was compromised the widow's transferee retained a portion of the property, whilst the reversioner and his vendee got the rest. A suit was then filed to pre-empt the sale by the reversioner

Held, that under the provisions of the Agra Pre-emption Act, 1922, no suit would lie to pre-empt such a sale *Abdul Wahid Khan* v. *Shahida Bibi* (1), referred to.

THESE were two appeals arising out of two suits for pre-emption, the plaintiff in each case being Musammat Desrani, and the defendants being Kalyan and Paras Ram

The second defendant to these suits, Paras Ram, had two cousins named respectively Parmanand and Pahlwan When Parmanand and Pahlwan died, they were succeeded by their respective widows, and these widows during their lifetime alienated the property of their husbands by sale in favour of certain third parties.

* Second Appeal No 1197 of 1925, from a decree of E L Norton, District Judge of Jhansi, dated the 7th of April, 1925, confirming a decree of Shri Nath, Officiating Munsif of Orai, dated the 1st of December, 1924

(1) (1893) I L R , 21 Calc , 436

When Parmanand and Pahlwan died, Paras Ram was the nearest reversioner. He was anxious to recover possession of the properties which had been alienated, as above stated, by the widows, but he had not the funds necessary to institute the suits which had to be brought in order to enable him to recover possession. In these circumstances, on the 13th of September, 1923, he executed two sale-deeds in favour of the defendant. Kalyan. By one of these deeds he purported to transfer by sale a portion of the zamindari share which had belonged to his cousin Pahlwan. By the other document, in a similar way, he purported to transfer a portion of the zamindari property which had belonged to Parmanand.

The documents were of a similar description. Referring to that which dealt with a portion of the share which had belonged to Pahlwan, in this sale-deed Paras Ram set out the facts and referred to the transfer which had been made by Pahlwan's widow, Musammat Rani Bahu. He recited that it was necessary for him to bring a suit to recover Pahlwan's property from the alienees of the widow and he declared that he had no funds for that purpose He went on to say that Kalyan had agreed to find him the money for this litigation and in consideration of Kalyan's undertaking to supply him with funds he purported to transfer to Kalyan a portion of the property which had once belonged to Pahlwan In this document Paras Ram stated that he had sold absolutely the property specified in the deed for the costs of the suit, which were estimated to amount to about Rs 1,000. It was stated in the deed that Kalyan undertook to join Paras Ram in the suit which was to be brought to recover Pahlwan's property; and then the deed went on to say that " when a decree for

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possession has been passed Kalyan will get possession of the shares sold to him, through the court." A further provision of the deed in question was that Kalyan was to pay the consideration in the following manner, namely, he was to supply all costs which might be incurred up to the High Court in appeal. If these costs were to exceed the sum of Rs. 1,000, Kalyan was not to be in a position to recover any excess from the vendor Paras Ram Then the document set out that in case a decree for possession was passed, Kalyan would take possession of the property sold to him and would get mutation made in his favour and would remain in possession as owner. The document wound up with the usual declaration to the effect that Paras Ram had executed this document as a deed of absolute sale

Following on this deed a suit was filed on the 17th of September, 1923, in which Paras Ram and Kalyan were arrayed as plaintiffs. The defendants were the persons to whom Pahlwan's widow, Musammat Rani Bahu, had alienated the property of Pahlwan. On the 17th of April, 1924, the suit was compromised. Under the compromise the defendants retained a portion of the property in dispute and consented to a decree for the balance in favour of the two plaintiffs The decree provided that out of the property allotted to the plaintiffs Kalyan was to get a 9/16ths share while Paras Ram was to get a 7/16ths share.

Following on this the present suit for pre-emption was filed on the 6th of September, 1924 The plaintiff, Musammat Desrani, having set out the facts, claimed that she was entitled to pre-emption of this property on payment of a sum of Rs. 200. In the plaint it was represented that the costs which

Kalyan had disbursed in connexion with the suit for possession could not have amounted to more than that sum.

The facts in the second suit, namely, the suit out of which Second Appeal No. 1198 arises, were similar, and the court below tried both cases together. The result in the court of first instance was that the plaintiff got a decree for pre-emption in each case The Munsif was of opinion that Kalyan had spent Rs. 963 in conducting the litigation which was necessary for the recovery of the property from the alienees of the widows He split this sum into two and gave the plaintiff a decree in each case for pre-emption on payment of Rs. 481-8-0. Both these decrees were affirmed in appeal by the District Judge of Jhansi and now in the second appeals the point raised was that the plaintiff had no right of pre-emption in either case, inasmuch as the sales which were effected by the documents of the 13th of September, 1923, were merely transfers of a right which had to be established by litigation.

On these appeals—

Maulvi *Mukhtar Ahmad*, for the appellant.

Dr. *N. C. Vaish*, for the respondent.

The judgement of LINDSAY, J., after setting forth the facts as above, thus continued :—

We have heard a great deal of argument in the case and a number of cases have been cited before us, all of them cases from Oudh One decision of the Privy Council has also been cited before us, namely, the case of *Abdul Wahid Khan* v *Saluka Bibi* (1).

After due consideration we have both come to the conclusion that the plaintiff was not entitled to pre-emption in these cases. We have not come to this

(1) (1898) I L R , 21 Calc , 496.

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conclusion on precisely identical grounds and, therefore, separate judgements are being delivered.

These cases are governed by the Agra Pre-emption Act, and according to that Act, a right of pre-emption means the right of a person on a transfer of immovable property to be substituted in the place of the transferee by reason of that right.

The only transfers which give occasion for the exercise of the right of pre-emption are transfers by sale and foreclosure. Sale, for purposes of the Pre-emption Act, means a sale as defined in the Transfer of Property Act, 1882.

In these cases the plaintiff claims her right to pre-empt by reason of the execution and registration of the two documents of the 13th of September, 1923, and in order to ascertain whether these are sales which are pre-emptible under the Act we have to look at what was the substance of these transactions.

At the time these deeds were executed the property was in the possession of third parties to whom it had been conveyed by a Hindu widow. The transferee, that is to say Kalyan, was to provide the funds required for the prosecution of the suit necessary to recover the property As we have pointed out, he joined as a plaintiff in the suit and was to get possession, through the court, of the property mentioned in the deed if and when a decree for possession was made in favour of himself and his transferor Paras Ram. But this decree for possession might never have been passed, in which case the transferee, that is, Kalyan, would have lost his money and got nothing for it. To quote the words of the Privy Council in *Saluka Bibi's* case (1)—

(1) (1898) I L R, 21 Calc, 496.

"If the defendant succeeded and the suit was dismissed there would have been no property to be sold."

To me, therefore, the correct view seems to be that the transfers made by the deeds of the 13th of September, 1923, were merely transfers of a share of the chance of success in a suit which was subsequently to be brought The purchaser, that is, Kalyan, knew that the title of his vendor was uncertain, dependent upon the result of a suit which itself was uncertain. He new that Paras Ram was not in a position to pass a proprietary interest in the property unless and until he had successfully vindicated his title as reversioner after the widows by avoiding the sale which had been made by them The proprietary interest in these properties was at that time in the alienees from the widows It is true that the sales by the widows were voidable and that these alienees had not an indefeasible title, but all the same, unless and until their title was set aside in favour of a superior title in Paras Ram, the ownership of these properties was vested in the alienees.

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Kalyan knew all these facts and he took the risk of the suit not being decreed, and consequently the sum which he undertook to pay was not the price of immovable property sold to him but the price he was prepared to give for the chance of the success of Paras Ram and himself in the subsequent suit.

In a sale under section 54 of the Transfer of Property Act the proprietary interest is transferred on execution and registration of the sale-deed where the property is of the value of Rs. 100 and upwards. Here the proprietary interest in these lands could not have passed on execution and registration of the deeds of the 13th of September, 1923, and in fact no

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proprietary interest in these properties passed to Kalyan until the court gave a decree in favour of himself and Paras Ram on the 17th of April, 1924.

For these reasons I am of opinion that under the deeds of the 13th of September, 1923, there was no transfer of proprietary interest and, therefore, no case for the exercise of a right of pre-emption under the Agra Pre-emption Act. I hold, therefore, that these appeals ought to be allowed and that the decrees of the courts below should be set aside and it should be ordered that both suits brought by Musammat Desrani be dismissed with costs in all courts

SULAIMAN, J.:—I concur in the order proposed. It cannot be said that in all cases where the vendor is not in possession of the property which he purports to sell, the sale is not capable of pre-emption. If a registered document is executed and the transfer is for a *price* paid or promised, or part paid and part promised, and comes within the meaning of section 54 of the Transfer of Property Act, a sale is duly effected and the proprietary interest in the property passes, no matter whether the vendor is or is not in actual possession. A transfer of the property which has become vested in a reversioner on the death of a Hindu widow passes the proprietary title in it even though a suit may have to be instituted to recover actual possession. The vesting of such title is not postponed till the passing of a decree on which delivery of possession would be dependent. On the other hand, there may be cases where the cash price paid or promised is not the sole consideration for the transfer, but in addition thereto there is an undertaking by the vendee to fight out a litigation and to incur all its costs as well as to run the risk of losing his money. In such cases that part of the consideration which is

other than the cash price is not capable of exact valuation. It is, therefore, difficult to see how a pre-emptor can be given a decree for pre-emption of the property sold in such a way. In the present case the sale was effected in lieu of the costs of the litigation. If, taking the surrounding circumstances into consideration, one were to infer that part of the consideration was an undertaking by the vendee that he would fight out the case against third parties, then it is obvious that it was not a sale strictly for a cash price. Even though there was no such undertaking the transfer was in lieu of the costs of litigation, which were unknown and unascertainable in advance, and there was a risk involved. Under such circumstances it would be too much to suppose that the amount of the costs contemplated by the parties would be anything like the market value of the property if freed from all risk It would be grossly unjust to give the plaintiff a decree for pre-emption after the suit has successfully terminated and the property has been recovered and all risks have disappeared. In my opinion a sale which is not in lieu exclusively of a cash price, or such price as can be definitely ascertained, is not capable of pre-emption

Sulaiman, J.

BY THE COURT :—Second Appeals Nos. 1197 and 1198 of 1925 are allowed, the decrees of the courts below are discharged and it is ordered that the plaintiff's claim in each suit be dismissed with costs in all courts.

Appeal allowed.

Before Mr. Justice Boys and Mr. Justice Kendall.

1927 *January*, 19.

PRAHLAD PRASAD AND ANOTHER (PLAINTIFFS) *v.* BHAGWAN DAS AND ANOTHER (DEFENDANTS).*

Act No II of 1899 (Indian Stamp Act), section 61; schedule I, article 5(c)—Act No IX of 1872 (Indian Contract Act), section 25(3)—Stamp—Promise to pay a time-barred debt—Acknowledgement of balance of account coupled with admission of rate of interest payable—Agreement.

On a creditor sending to a debtor a statement of the account between them, the debtor endorsed thereon an admission of the correctness of the balance found, and added —"interest at 12 annas per cent. per mensem."

Held, that this was more than a mere acknowledgement of liability, but was an agreement not otherwise provided for within the meaning of article 5(c) of the first schedule to the Indian Stamp Act, 1899.

Held, further, that although there was no promise to pay in express words, the memorandum fell within section 25(3) of the Indian Contract Act

Ganga Prasad v. *Ram Dyal* (1) and *Gobind Das* v. *Sarju Das* (2), distinguished *Laxumibai* v. *Ganesh Raghunath* (3), *Mahadeo Kori* v. *Sheoraj* (4) and *Mulchand Lala* v. *Kashibullav Biswas* (5), followed

THE facts of this case are fully stated in the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Dr. *Kailas Nath Katju* and Munshi *Shiva Prasad Sinha*, for the respondents.

BOYS and KENDALL, JJ.:—The plaintiff appellant here had advanced certain moneys to the defendant. In accordance with the common practice he sent to the defendant on the 29th of September, 1922, a statement of account, in which he showed that

* Second Appeal No. 1207 of 1924, from a decree of L. Johnston, District Judge of Pilibhit, dated the 12th of May, 1924, reversing a decree of Gaun Prasad, Subordinate Judge of Pilibhit, dated the 29th of January, 1924

(1) (1901) I L R., 23 All., 502 (2) (1908) I L R., 30 All., 268
(3) (1900) I L R., 25 Bom., 373 (4) (1918) I L R., 41 All., 169.
(5) (1907) I L R., 35 Calc., 111

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Rs. 2,366-2-6 were due to him from the defendant. This is the last account which was sent in to the defendant. On that account the defendant endorsed an acknowledgement that Rs. 2,366-2-6 remained due from him to the plaintiff and added the words "interest at 12 annas per cent per mensem." A reference to this memorandum signed by the defendant is made in paragraph 3 of the plaint, and in paragraph 5 of the plaint the plaintiff further states that the correctness of the statement of account is supported by his account books. The trial court decreed the plaintiff's suit. The lower appellate court held that this document was merely an acknowledgement of the amount due from the defendant and that it came within article 1 of the Stamp Act, and that as such it required a one-anna stamp, and not having been stamped, was inadmissible in evidence.

Neither party has been able to put before us very clearly the circumstances in which the trial court apparently admitted the document into evidence, but it bears an endorsement by the trial court "admitted in evidence against the defendant" and it was undoubtedly considered by the trial court. In view, however, of the opinion at which we have arrived on the point which we shall next discuss, it is unnecessary for us to consider the effect of section 36 of the Stamp Act and whether the lower court was right in excluding it from the record if it had been once accepted in evidence.

The first question argued before us for the appellant is that this document was more than a mere acknowledgement such as is described in the first paragraph of article 1 of schedule I of the Stamp Act, and that it came in fact within the proviso to that article. It was contended that the memorandum signed by the

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defendant did contain a promise to pay the debt and, at any rate, a stipulation to pay interest. We think that there can be no doubt on the terms of the document that the contention that the document contained a stipulation to pay interest must be accepted That the document contained a stipulation as to the rate of interest is beyond question on the face of it That stipulation must have had reference either to the rate of the past interest or to the rate of future interest to be paid or to both It is difficult to see what could have been the meaning of particularly mentioning the rate of interest if it only referred to past interest. That interest had already been calculated and formed part of the total which both parties agreed was due from the defendant There can be no possible reason then for referring to it unless it related to the interest which the defendant was agreeing to pay in the future on the balance which he was acknowledging to be due We have already stated that we are unable to see any reason for mentioning the rate of interest if it referred to the past. But it did not even refer both to the past rate of interest and the future, for it is stated to us on behalf of the appellant that the interest payable prior to the 29th of September, 1922, was 11 annas and the new interest to be payable according to the memorandum was to be 12 annas It is, therefore, apparent that the rate of interest quoted referred to the future and cannot be held to be anything but a stipulation to pay interest in the future. This is sufficient to take it out of article 1 of schedule I of the Stamp Act, and it would come within the terms of article 5 (*c*), schedule I, that is to say, it was an agreement not otherwise provided for and the stamp duty payable on it was 8 annas. That being so, the

lower court should not have held the document inadmissible in evidence but should have acted under section 61 of the Stamp Act.

We have next to consider the effect of section 19 of the Limitation Act. To make an acknowledgement valid for the purpose of saving limitation, the acknowledgement must have been made before the expiration of the period prescribed for the suit. It is urged on behalf of the respondent that certain of the items which went to make up the total acknowledged by the defendant to be due were already barred by limitation. If then this was a mere acknowledgement, we should have to consider the effect of section 19 in the light of this fact. But we have already held in connexion with article 1 of schedule I of the Stamp Act that this memorandum was something more than an acknowledgement of past liability, and we think that the contention of the appellant must be upheld that he is entitled to rely on section 25 of the Contract Act. It is there laid down that

"an agreement made without consideration is void unless [sub-section (3)] it is a promise made in writing and signed by the person to be charged therewith .... to pay.... a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

We are asked on behalf of the respondent to hold that in order to give the defendant the benefit of this section there must be an express promise in writing. This would apparently mean that we must be able to find the words "I promise to pay" or some equivalent words. We think that this is going beyond the section. We have to find whether there was or was not expressly or by implication in the memorandum a promise to pay. In our view it is impossible to hold that the stipulation as to interest can be interpreted

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otherwise than as a promise to pay interest in the future at the named rate, whether the promise was in express words such as "I promise to pay" or a matter of necessary implication is immaterial. On behalf of the respondent we are referred to the case of *Ganga Prasad* v. *Ram Dyal* (1). It is not necessary for us to say whether we would agree with the decision in that case that a mere acknowledgement of the amount due would or would not imply a promise to pay that amount. This case and the other case, *Gobind Das* v. *Sarju Das* (2), are clearly distinguishable from the present case in that in those cases the memorandum or acknowledgement contained no promise to pay interest. In the present case there was not only a mere acknowledgement by the defendant that he had incurred certain liability in the past, but there was a definite promise as to what he intended to do in the future On the other hand, for the appellant reliance is placed on the cases of *Laxumibai* v *Ganesh Raghunath* (3), *Mahadeo Kori* v. *Sheoraj* (4) and *Mulchand Lala* v. *Kashibullav Biswas* (5) In all three of these cases there was a condition as to the interest to be paid in the future, in almost exactly similar terms to those used in the memorandum in this case In the Bombay and Allahabad cases it is true that there had been no previous running account, but the document did provide for interest which was to be paid on the loan then being taken, and it was held that that provision as to interest was sufficient to alter the character of the memorandum from that of a mere acknowledgement to an agreement. The Calcutta case was still further on all fours with this case, in that it was also a case where the balance was due on a running account. The

(1) (1901) I L R, 23 All, 502 (2) (1908) I L R, 30 All, 968
(3) (1900) I L R, 25 Bom, 373 (4) (1918) I L R, 41 All, 169
(5) (1907) I L R, 35 Calc, 111

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three cases which we have last quoted support the view which we have ourselves expressed that the proper article of schedule I of the Stamp Act was article 5(*c*) and that the plaintiff was entitled to rely upon section 25 of the Contract Act.

The result is that, allowing the appeal, we set aside the decree of the lower appellate court and restore that of the trial court, subject to the appellant affixing stamps to the value of Rs. 5-8-0 to the document Ex. 2, numbered 37B, in accordance with the provisions of section 35 of the Stamp Act. The appellant will have his costs in this Court and the court below.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay

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January, 20.

RAM SINGH (DEFENDANT) *v.* MAN SINGH (PLAINTIFF) *

Act No II of 1899 *(Indian Stamp Act), section* 44, *sub-section (3)—Stamp—Deficiency in stamp discovered in pending suit and made good, but not entered in costs—Suit to recover amount so paid barred*

In the course of a suit on a mortgage it was discovered that the mortgage sued on was insufficiently stamped. The deficiency was made good by the plaintiff, although the liability was really on the defendant, but the payment so made was not included in the costs of the suit in the decree which was made in the plaintiff's favour.

Held, that the plaintiff could not thereafter sue to recover the amount which he had paid on account of the deficiency in stamp duty from the defendant.

THIS was an application in revision against a decree of the Court of Small Causes at Chandausi. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

* Civil Revision No 182 of 1926

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RAM SINGH v. MAN SINGH.

Mr. *P. N. Sapru*, for the applicant.

Munshi *Panna Lal*, for the opposite party.

LINDSAY, J. :—The question in this case is the correct interpretation of section 44, sub-section (3) of the Indian Stamp Act, 1899. This sub-section was pleaded as a bar to the suit in the court below. The Judge of the Small Cause Court overruled the objection and held that sub-section (3) to section 44 was not a bar. In my opinion the decision is erroneous. The section has not been correctly interpreted by the court below The facts are quite clear. The plaintiff Man Singh held a mortgage from the defendant Ram Singh, dated the 11th of November, 1922 He put that mortgage in suit, and while the case was pending it was discovered that there was a deficiency of stamp duty. Nobody denies that Ram Singh, the mortgagor, was the person who was liable for this deficiency.

The plaintiff, having paid the deficiency in order to make the instrument regular and in order to get a decree, has brought this suit for the recovery of the money paid by him. He apparently did not make any application to the court which was trying the mortgage suit to include the amount so paid in the costs of the suit.

The terms of section 44 (3) provide

" Such amount may, if the court thinks fit, be included in any order as to costs in any suit or proceeding to which such persons are parties and in which such instrument has been tendered in evidence "

Here the plaintiff and defendant were parties to the mortgage suit and the mortgage was tendered in evidence. The sub-section then goes on to say

" If the court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable."

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These last words are as precise as can be, and in my opinion they indicate clearly that a suit for the recovery of deficiency in stamp duty cannot be entertained if the case falls within the provisions of sub-section (3) of section 44.

I allow the application, set aside the decree of the court below and dismiss the plaintiff's claim. Parties will bear their own costs in both courts.

Application allowed.

APPELLATE CIVIL.

Before Mr Justice Dalal and Mr Justice Pullan

AHMADI BEGAM (PLAINTIFF) *v* ABDUL AZIZ AND OTHERS (DEFENDANTS) *

1927 *January*, 21.

Muhammadan law—Gift of undivided share of joint property—Donor not in possession at time of making— "Musha."

A Muhammadan father, who was not in possession at the time, made a gift of an undivided share of joint property to his daughter, but he did all that was possible for him to do to put his daughter in the same position in which he himself was, and he and his daughter subsequently jointly sued the other co-owners of the property and obtained a decree *Held*, that the gift was not invalid for want of the donor's possession, or by the doctrine of *musha*, and in the circumstances of the case the doctrine of *musha* did not apply, as the donor had ostensibly sold the property first at a fixed price and then absolved the debtor of the debt which was the price. *Mohamed Buksh Khan* v *Hosseini Bibi* (1), *Mohibullah* v *Abdul Khalik* (2) and *Sheikh Muhammad Mumtaz Ahmad* v *Zubaida Jan* (3), referred to.

THE facts of this case were as follows:—

The plaintiff, Musammat Ahmadi Begam, sued for partition of her share of eight shops and a yard

* Second Appeal No 1331 of 1924, from a decree of Achut Nath Mukerji, District Judge of Bareilly, dated the 8th of August, 1924, confirming a decree of Free Nath Ghose, Subordinate Judge of Bareilly, dated the 22nd of December, 1923

(1) (1888) I L R, 15 Calc, 684. (2) (1906) I L R, 30 All, 250
(3) (1886) L R, 16 I A, 205.

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for the collection of wood. This property belonged to her father, and the defendants are the other heirs. She claimed a share specified as 1974 out of 6502. The dispute between the parties related to a gift made by the father in his lifetime to the plaintiff of 1,000 sihams. The gift was objected to on two grounds: (1) that the father himself not having been in possession at the time, could not have given possession to the daughter, and so the gift was invalid for want of possession, and (2) that the gift was an invalid one of *musha*, i.e., an undivided share of joint property

Both the subordinate courts upheld the contention and held the gift to be inoperative. They further declared plaintiff's title in the property in accordance with her right as an heir, ignoring the gift. The plaintiff appealed

Dr *Surendra Nath Sen* and Mr *B Mullick*, for the appellant.

Mr *Akhtar Husain*, for the respondents.

The judgement of the Court (DALAL and PULLAN, JJ.,) after stating the facts as above, thus continued.—

The learned Judge of the lower appellate court has not quoted any ruling in support of his view. The father himself was out of possession at the time of the gift and he did all that was possible for him to do in putting his daughter in the same position in which he was He and his daughter subsequently jointly sued the other co-owners of the property and obtained a decree Under these circumstances want of possession at the time of the gift would not render the gift invalid In the case of *Mohamed Buksh Khan* v. *Hosseini Bibi* (1) their Lordships observed at page 702:

(1) (1888) I L R, 15 Calc, 684

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"In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift and that nothing more was required from her The gift was attended with the utmost publicity The *hibanama* itself authorized the donees to take possession and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that the donor had not been in possession and that she herself did not give possession at the time."

This ruling fully supports the claim of the plaintiff that the gift cannot fail for want of possession at the time of the gift

There is a single Judge ruling of this Court, *Mohbullah* v. *Abdul Khalik* (1), in which the principle enunciated by their Lordships of the Privy Council in the case of *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (2) was applied to a house. Possibly the case which was before their Lordships was one where the donor himself questioned the validity of the gift, and it may be argued that it could not be applied generally where no such question of equity arose. This is how Mr Tyabji interprets the ruling in his book on Muhammadan Law at page 422. This Court, however, has gone further in the matter and held the gift to be valid even where it is not the donor himself who questions it. We are in agreement with that view Mr. Ameer Ali in his Muhammadan Law has stated the principle to be that a *hibabil-musha*, i.e , gift of an undivided joint property is not void, but only invalid, and possession remedies the defect. Mr Tyabji does not appear to accept that view but he has suggested a device by which the operation of the doctrine may be condoned, and that

(1) (1908) I L.R , 30 All , 250 (2) (1889) L R , 16 I A , 205

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AHMADI BEGAM v. ABDUL AZIZ

device was adopted in the present case. At page 403 he quotes a Hanafi lawyer as laying down that a gift of a moiety of a house can validly be effected by the donor selling it first at a fixed price and then absolving the debtor of the debt which was the price This was exactly what the plaintiff's father did, and on this ground also the doctrine of *musha* will not apply.

For these reasons we decree the appeal and declare the share of the plaintiff to be that which she claimed in her plaint. This is a preliminary decree for partition and this declaration will be sufficient. The plaintiff shall receive her costs of all courts

Appeal allowed.

Before Mr Justice Dalal and Mr Justice Pullan

1927 *January*, 21

BADAL SINGH AND OTHERS (PLAINTIFFS) *v* DEBI SARAN DHAR DUBE (DEFENDANT)

Civil Procedure Code, order XXXIV, rule 6—Mortgage—Decree for sale—Sale proceedings and mortgage subsequently declared void—Refund of money to auction purchaser—Application for personal decree against mortgagor—Limitation.

A plaintiff mortgagee obtained a decree for sale, in execution of which his claim was satisfied. The mortgagor's grandson, however, thereafter obtained a decree declaring that both the mortgage and the decree and consequent sale were void as against him The result was that the auction-purchaser applied for and obtained the return of his purchase-money The mortgagee then applied under order XXXIV, rule 6, of the Code of Civil Procedure, for a personal decree against his mortgagor.

Held, (1) that it was competent to the mortgagee to apply under order XXXIV, rule 6, and (2) that time began to run not from the date of the decree setting aside the

* Second Appeal No 1431 of 1924, from a decree of Radha Kishan, Subordinate Judge of Basti, dated the 21st of August, 1924, reversing a decree of Jagannath Singh, Munsif of Bansi, dated the 7th of March, 1924

auction-sale, but from the time when the auction-purchaser recovered his money.

Pirbhu Narain Singh v *Baldeo Misra* (1), distinguished *Kedar Nath* v *Chandu Mal* (2), *Ram Raghubir* v. *Imam Begam* (3) and *Sheo Din* v *Bhawani Bakhsh* (4), referred to.

THE facts of this case are sufficiently apparent from the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellants.

Mr. *Sankar Saran*, for the respondent.

DALAL and PULLAN, JJ.:—The plaintiff in this suit is a mortgagee who obtained a decree on a mortgage executed by one Debi Saran in the year 1913 and in execution of that decree put the mortgaged property to sale and obtained full satisfaction on the 22nd of April, 1919. At this point the mortgagor's grandson came forward and obtained a decree to the effect that the whole proceedings, including the mortgage and the sale, were void against him. As a result of that decree the auction-purchaser of the property demanded the return of his money and obtained the return on the 22nd of February, 1923. This application has been made under rule 6 order XXXIV of the Code of Civil Procedure for a personal decree against the mortgagor. The application was allowed by the court of first instance but disallowed on appeal by the Subordinate Judge on two grounds. In the first place, he holds that rule 6, order XXXIV, has no application to this case, and, secondly, that even if such an application could be made, it is barred by the three years rule of limitation provided by article 181 of the Limitation Act. Rule 6, order XXXIV, provides for a case in which the net proceeds of sale are insufficient to pay the amount due to the plaintiff. Now in the present case the net proceeds of the sale

(1) (1906) I L R., 29 All., 260. (2) (1903) I L R., 26 All., 25.
(3) (1909) 9 Indian Cases, 403. (4) (1911) 14 Oudh Cases, 62.

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were sufficient to pay the amount due But when in consequence of an order of the court the plaintiff was compelled to refund to a third party the whole amount received by the sale, it must be held that the net proceeds of the sale were nil and therefore insufficient to pay the amount due The lower court has followed the authority of *Pirbhu Narain Singh* v *Baldeo Misra* (1) In that case there had been no sale and it was on this account that the learned Judge of this Court distinguished an earlier ruling in *Kedar Nath* v *Chandu Mal* (2) In our opinion the ruling in *Kedar Nath* is more in point than the ruling in *Pirbhu Narain Singh*, and we refer in particular to the passage of the judgement of Mr Justice AIKMAN on page 27, where he says: "It appears to me that on this state of facts it would be in the highest degree inequitable to refuse him a decree by which alone he can recover from the judgement-debtors the unpaid balance of money which they owed him"

We would also remark that the Oudh Court at least has not followed the ruling in *Pirbhu Narain Singh* v. *Baldeo Misra* even in cases which were exactly parallel, see the judgement of Mr SUNDAR LAL in the case of *Ram Raghubir* v. *Imami Begam* (3) and that of Mr. EVANS in the case of *Sheo Din* v *Bhawani Bakhsh* (4). Thus, in our opinion, rule 6, order XXXIV, does apply to this case.

The second point to decide is that of limitation. The period of limitation under article 181 of the Limitation Act begins to run from the date when the right to apply accrues. The lower court finds that the right to apply accrued from the 14th of August, 1919, when the decree for setting aside the auction-sale was passed But that decree did not in itself

(1) (1906) I L R, 29 All, 260
(2) (1903) I L R, 26 All, 25
(3) (1909) 9 Indian Cases, 403
(4) (1911) 14 Oudh Cases, 62

take away from the present applicant the purchase-money which he still continued to hold in execution of his decree, and we consider that his right to apply only accrued from the 22nd of February, 1923, when the auction-purchaser recovered the money. On this finding the present application is within time. We, therefore, allow this appeal with costs and restore the order of the court of first instance.

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DAL SINGH v. DEBI SARAN DUBE

Appeal allowed.

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Lindsay, Mr. Justice Dalal, Mr. Justice Mukerji, Mr. Justice Ashworth, Mr. Justice Kendall and Mr. Justice Pullan

BAIJ NATH AND ANOTHER (DECREE-HOLDERS) v. RAM BHAROS (OBJECTOR) *

1927 January, 24

Civil Procedure Code, section 48—Execution of decree—Limitation—Application for revival of execution proceedings—"Fresh application"

The holders of a decree for sale, which was made final on September 28, 1912, applied for execution (the second application) on December 22, 1915. Pending this application, the parties came to a compromise and agreed that the decree should be payable by instalments. Three instalments were paid, and then the judgement-debtors made default. A third application for execution was made, but without result. The fourth application was made on October 22, 1923, and execution of the decree was transferred to the Collector. Meanwhile the original judgment-debtors' interest in the property had been sold in execution of a simple money decree and one *RB* became the purchaser. He paid Rs. 1,000 to the decree-holders and asked for a year's time to enable him to pay the balance. The Collector gave three months' time and finding it unnecessary to

* First Appeal No. 68 of 1926, from a decree of Vishnu Ram Mehta, First Subordinate Judge of Cawnpore, dated the 7th of November, 1925.

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keep the case pending in his court returned the decree and the papers to the civil court After the expiry of the three months granted by the Collector, the decree-holders again applied asking that the " papers of the former application " might be sent to the Collector for execution This was on January 28, 1925 This application was granted on February 6, 1925 Shortly after this the principal decree-holder, Ram Lal, died, and his sons applied on April 28, 1925, praying that they might be brought on the record in place of their late father and that the execution might be proceeded with

Held, on objection taken by the judgement-debtor, that there was no bar to execution being proceeded with on this application

Jurawan Pasi v *Mahabir Dhar Dube* (1) and *D. S. Apte* v. *Tirmal Hanmant Savnur* (2), referred to *Chhattar Singh* v *Kamal Singh* (3), followed.

THIS case was laid before a Full Bench at the instance of DALAL and PULLAN, JJ., in view of certain apparent discrepancies between the Allahabad and the Bombay and Lahore High Courts

The following is the Referring Order :—

DALAL and PULLAN, JJ. :—The lower court decided this execution application on the basis of a judgement of a Bench of this High Court in *Jurawan Pasi* v *Mahabir Dhar Dube* (1). The facts of this case are the same as those in the case therein decided But in view of the fact that this ruling has not been accepted by the Bombay High Court in *D. S. Apte* v. *Tirmal Hanmant Savnur* (2), and the Lahore High Court has taken a contrary view, although without noting the judgement of the Allahabad High Court to which we have referred, in *Banarsi Das* v. *Ramzan* (4), we are of opinion that this appeal should be referred to the decision of a larger Bench We, therefore, submit the case to the Hon'ble Chief Justice with a request that he will form a Bench for the hearing of this appeal.

(1) (1918) I.L.R., 40 All., 198
(2) (1925) I.L.R., 49 Bom., 695.
(3) (1926) I.L.R., 49 All., 276
(4) (1923) 73 Indian Cases, 671

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BALI NATH v. RAM BHAROS.

On this appeal—

Pandit *Uma Shankar Bajpai*, for the appellants

Dr. *N. C. Vaish*, for the respondent.

MUKERJI, LINDSAY, DALAL, ASHWORTH, KENDALL and PULLAN, JJ.:—This case has been referred to a Full Bench to obtain a decision of the question, viz., which of the two cases—*Jurawan Pasi* v. *Mahabir Dhar Dube* (1) and *D. S. Apte* v. *Tirmal Hanmant Savnur* (2)—was correctly decided?

The facts of the case are only partially given in the judgement of the lower court. This being a first appeal, we looked into all the facts involved in the case and we find that having regard to certain facts, to be presently mentioned, the question referred does not arise for decision.

The appellant's late father, Ram Lal, and certain other persons obtained a decree for sale which was made final on the 28th of September, 1912. The date given in the execution application is presumably the date of the preliminary decree. After an infructuous application, another was made on the 22nd of December, 1915. In the course of this execution the parties came to terms. It was agreed that out of the sum of Rs. 5,338 then found due, the judgement-debtors should pay up at once the sum of Rs. 338 and should pay the balance by yearly instalments of Rs. 330. The judgement-debtors regularly paid three instalments and thereafter made a default. Another application accordingly, followed and it ended in no result. The fourth application was made on the 22nd of October, 1923, and, the property being ancestral, the execution of the decree was transferred to the Collector. In the meantime the judgement-debtors' interest in the property had been sold in

(1) (1918) I L R, 40 All, 198 (2) (1925) I L R, 49 Bom, 695

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execution of a simple money decree obtained by the respondent against them, and was purchased by him, and, consequently, the respondent was made a party as a successor in title of the original judgement-debtors. The respondent made a deposit of Rs 1,000 and asked for a year's time to enable him to pay up the balance of the decretal amount The Collector gave three months' time and finding it unnecessary to keep the case pending in his court, returned the decree and the papers to the civil court After the expiry of the three months which were granted by order dated the 16th of October, 1924, Ram Lal, by an application, dated the 28th of January, 1925, prayed that the " papers of the former execution " might be sent to the Collector for execution. This application was granted by order dated the 6th of February, 1925 Almost immediately after this Ram Lal died and his sons, the present appellants, put in the last and sixth execution application on the 28th of April, 1925, praying that they might be brought on the record in place of their late father and that the execution might be proceeded with It is to be noted that Ram Lal had been taking out execution for the benefit of himself and his co-decree-holders, and his sons also made a similar prayer

When the execution proceedings were pending in the court below, the respondent Ram Bharos preferred an objection to the execution, basing his case on section 48 of the Code of Civil Procedure He urged that twelve years had expired from the date of the decree, viz., 28th of September, 1912, and that, therefore, the sixth application of the 28th of April, 1925, was not entertainable. The learned Subordinate Judge accepted this plea and dismissed the application as barred by time.

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In the court below it was urged that the compromise between the original judgement-debtors and the decree-holder, effected on the 18th of December, 1916, having been accepted and recorded by the court, there came into existence a " subsequent order " within the meaning of section 48 of the Code of Civil Procedure, by which recurring periods were fixed for payment of the decretal amount and that, therefore, the limitation of twelve years would begin from the dates of default in making payment at those recurring periods. The learned Subordinate Judge found that he was bound by the case of *Jurawan Pasi* v. *Mahabir Dhar Dube* (1) and that the order of the execution court could not be a " subsequent order " contemplated by section 48.

In this Court this argument has been repeated on behalf of the decree-holders

As already stated, on examination of the record and on the admission of the parties, we discovered that certain aspects of the case, already noted above, were not noticed in the court below. Those were these The respondent himself asked for a year's time and obtained three months on the 16th of October, 1924. The grant of time by the Collector did not in any way dispose of the application. The application should have been kept pending by the Collector on his file. He, however, chose to return the papers to the civil court On receipt of the papers on the 23rd of December, 1924, the civil court passed the following order :—

" The papers having been received today it is ordered that an entry be made in the register of execution and the papers be consigned to the record room in the judgeship of Cawnpore along with the *basta* (the files of other cases)."

(1) (1918) I L R, 40 All, 198.

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The order shows that the learned Subordinate Judge did not consider the application on the merits and did not decide whether the application was to be dismissed or was to be granted. He received the papers back from the court of the Collector and ordered that they should be consigned to the record room. As recently held in the Full Bench case of *Chhattar Singh* v. *Kamal Singh* (1), a disposal of an execution proceeding like the above was not a final decision of an execution application The application must be treated as still pending on the 23rd of December, 1924. The decree-holder, Ram Lal, by his application dated the 25th of January, 1925, did not ask for any fresh prayer All that he wanted was that the (*missil ijra sabik*) records of the previous execution should be sent back to the Collector. He was, therefore, simply asking for reviving the execution which had been suspended by the order of the Collector and by the consignment of the papers into the District Judge's record room In this view, which is in accordance with the Full Bench case already mentioned, the application of the 25th of January, 1925, was not a "fresh application" within the meaning of section 48 of the Code of Civil Procedure It was an application to carry on a previous application which was still pending

When the sons of Ram Lal, on his death, made the application of the 28th of April, 1925, they did not ask for any fresh proceedings. They said that Ram Lal's name might be removed and the petitioners' names might be entered in the array of decree-holders They had to make an application in the usual form of ten columns, because there is no rule of law which enables the legal representative of a deceased decree-holder to apply for mere substitution

(1) (1926) I L R, 49 All, 276

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of names. He must apply, whenever he does apply, for execution of the decree, vide order XXI, rule 16, of the Code of Civil Procedure It is clear, therefore, that neither the application of the 28th of January, 1925, nor the application of the 28th of April, 1925, was a "fresh application" within the meaning of section 48 of the Code of Civil Procedure.

The result is that the question whether a fresh application should be granted or not has not yet arisen

We set aside the decree of the court below, dismiss the respondent's objection to the execution and remand the case to the lower court with the direction that the execution be proceeded with according to law. The appellants will have their costs in this Court and in the court below

WALSH, A. C. J .—I have read the judgement of Mr Justice MUKERJI and agree This is sufficient to dispose of the case, and renders it unnecessary to express any opinion upon the question of law which was referred to this Special Bench, namely, the true interpretation of the expression "subsequent order" in section 48 of the Code of Civil Procedure I prefer to reserve my opinion upon the question whether *Jurawan Pasi* v *Mahabir Dhar Dube* (1) was right There are difficulties about the contrary interpretation, and I entertain considerable doubt whether the execution court has jurisdiction to alter the decree by directing payment by instalments even by consent But all difficulty can be removed by the exercise of a little common sense. If the execution court is applied to, it can refer the parties to the trial court, where the application can be dealt with, and in the great majority of cases the two courts are identical.

BY THE COURT.—We set aside the decree of the court below, dismiss the respondent's objection

(1) (1918) I L R, 40 All, 198

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to the execution and remand the case to the lower court with the direction that the execution be proceeded with according to law. The appellants will have their costs in this Court and in the court below.

Decree set aside.

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Sulaiman

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January, 24

BHAGWAN SAHAI (DEFENDANT) *v.* NANAK CHAND AND OTHERS (PLAINTIFFS) AND RAM LAL AND OTHERS (DEFENDANTS) *

Pre-emption—Two suits by rival pre-emptors standing on same footing—Transfer of property in suit by the vendee to one of the two pre-emptors—Lis pendens.

Inasmuch as the doctrine of *lis pendens* applies to a suit for pre-emption, it is not possible for a defendant vendee to give preference to one of two pre-emptors with equal claims, each of whom has brought a suit for pre-emption, by selling the subject-matter of the suit to him to the exclusion of the rival pre-emptor. *Manpal* v. *Sahib Ram* (1), distinguished *Kamta Prasad* v. *Ram Jag* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Mr *B. Mullick* (for Dr. *Surendra Nath Sen*) and Munshi *Ajudhia Nath*, for the appellant

Babu *Piari Lal Banerji* and Munshi *Kailas Chandra Mital*, for the respondents.

LINDSAY and SULAIMAN, JJ.:—Both these appeals arise out of a suit for pre-emption which was brought by one Moti Ram, now represented by Nanak Chand and others. It appears that on the 17th of

* Second Appeal No 1224 of 1925, from a decree of R L Yorke, District Judge of Bulandshahr, dated the 27th of March, 1925, modifying a decree of Kashi Nath, Subordinate Judge of Bulandshahr, dated the 22nd of April, 1924

(1) (1905) I.L.R., 27 All., 544 (2) (1913) I L R, 36 All, 60

October, 1922, the defendants Nos. 2 to 6 in the suit sold certain zamindari property to one Ram Lal for the sum of Rs. 4,830. On the 7th or 8th of October, 1923, Moti Ram filed his suit for pre-emption. On the 13th of October, 1923, a rival suit for pre-emption was filed by Risaldar-Major Bhagwan Sahai, who is the appellant before us.

After this, that is to say, on the 20th of October, 1923, we find that Ram Lal, the original purchaser, sold the property to the Risaldar for the sum for which he himself had purchased. Moti Ram having become aware of this transfer to the Risaldar, impleaded Risaldar Bhagwan Sahai as a defendant in his suit He also amended his plaint and pleaded that the transfer to the Risaldar was collusive and that in any case he had a better right to pre-empt the property than Bhagwan Sahai.

It is further to be noted that Bhagwan Sahai, having obtained a conveyance from Ram Lal, withdrew his suit on the 14th of April, 1924

It has been found by the courts below, and there is no dispute, that so far as the right to pre-empt was concerned, Moti Ram and Bhagwan Sahai stood on the same footing, each had an equal right to pre-empt the sale in question

The first court gave Moti Ram a decree for pre-emption for half the property Both parties appealed to the District Judge and the learned District Judge has decreed the claim of the plaintiff in its entirety, differing from the court below. The learned Judge was of opinion that the sale to Bhagwan Sahai on the 20th of October, 1923, was a transfer *pendente lite*, and inasmuch as Bhagwan Sahai had withdrawn his suit, he came to the conclusion that on the date the lower court pronounced its decree it ought to have awarded Moti Ram the whole of the property, presumably because on that date Bhagwan Sahai was no

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longer in the position of a rival plaintiff for pre-emption.

Bhagwan Sahai has come here in second appeal. As the memorandum of appeal stands it would seem that Bhagwan Sahai is still claiming that he was entitled to retain the whole of this property and that Moti Ram's suit ought to have been dismissed *in toto* However, this attitude has been modified here and Mr. *Mullick*, who has argued the cases on behalf of the appellant, is constrained to admit that in no case can his client recover more than half the property if these appeals be decided in his favour

It is now definitely settled in the course of a number of decisions of this Pre-emption Bench that the doctrine of *lis pendens* does apply in pre-emption suits and consequently no transfer made during the pendency of a pre-emption suit can have any effect on the right of the plaintiff as it stood at the moment the suit was brought.

According to the respondents' argument here, when Moti Ram brought his suit on the 7th or 8th of October, 1923, his right was a right to pre-empt the entire property, but we think this is not a correct statement of the legal position It is admitted, as we have said, that Bhagwan Sahai has just as good a right to pre-empt this property as Moti Ram, and we know that on the 13th of October, 1923, he brought a suit to enforce that equal right. It appears to us, therefore, that when Moti Ram brought his suit on the 7th or 8th of October, 1923, it could not be and that his right was a right to pre-empt the entire property, for clearly his right of pre-emption was subject to the rights of other pre-emptors with equal claims who might bring suits for pre-emption within the period of limitation. In other words, Moti Ram's right of pre-emption at the date the suit was brought was a right to share the

property under pre-emption with other pre-emptors of equal degree who might bring their suits within limitation

It cannot be denied that the transfer to Risaldar Bhagwan Sahai was made *pendente lite*, and we must give full effect to this principle, but it seems to us that it cannot really be said that this transfer made on the 20th of October, 1923, necessarily affects the rights of Moti Ram, the plaintiff Had the two rival suits for pre-emption been fought out, it is quite clear that both parties would have been entitled to take the property in equal shares, and we do not think that these rights were affected by the transfer which was made in favour of Bhagwan Sahai on the 20th of October, 1923. Bhagwan Sahai had asserted his right of pre-emption by suit and he had satisfied his claim by taking over the property from Ram Lal. He had withdrawn his own suit but he had been joined as a defendant by Moti Ram. We, therefore, think that the situation was that Bhagwan Sahai, by taking this transfer, could not improve the position in which he stood while he was still asserting his right of pre-emption as a rival plaintiff, and so we have come to the conclusion that, on the facts as they stand, Bhagwan Sahai could not be heard to say that he was entitled to retain the whole of this property. On the other hand, we think that Moti Ram, for the reasons given above, could not assert that he had an absolute right to the whole of the property by pre-emption. The rights of the parties were to take the property in equal shares and that is the right which ought to be enforced under these appeals Mr *Mullick*, in the course of his argument, has referred to a Full Bench ruling, *Manpal* v. *Sahib Ram* (1). That was a peculiar case and has been commented upon in several subsequent decisions.

(1) (1905) I L R, 27 All., 544

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We refer in this connexion in particular to the decision of the Pre-emption Bench in *Kamta Prasad* v. *Ram Jag* (1), where the learned Judges state that the Full Bench case just referred to was decided on a misapprehension of the facts. For the reasons we have just given we are of opinion that the proper order to make in this case is that the plaintiffs were entitled to pre-empt a one-half share of the property on payment of one-half of the consideration. We, therefore, allow these appeals, set aside the decrees of the lower appellate court and restore the decrees of the court of first instance in each case. Parties will bear their own costs in all courts.

Appeal allowed.

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr Justice Mukerji and Mr Justice Banerji

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UPPER INDIA RICE MILLS, LIMITED (APPLICANT) *v.* THE JAUNPUR SUGAR FACTORY, LIMITED (OPPOSITE PARTY) *

Principal and agent—Common agent of two companies—Money of one company used by the agent for the benefit of the other—Liability to refund—Limitation—"Money had and received"

Two companies, neither of whom did any regular business in the way of lending money, were managed by the same agents. From time to time sums of money belonging to the better-off of the two companies were used in the business of the other. Both companies went into liquidation and the liquidator of the company which had, so to speak, lent the money called upon the liquidator of the other company for re-payment. The claim was repudiated as time-barred.

Held, that the fact that the managing agents of the two companies were common to both would not exempt the

* Appeal No 68 of 1926, under section 10 of the Letters Patent.

(1) (1913) I L R. 36 All., 60

company which had had the use of the other's money from liability to refund, but the period of limitation would be three years from the date of each actual payment, and, in view of the fact that this period had already run when the debtor company went into liquidation, the claim was barred by time

THIS was an appeal under section 10 of the Letters Patent from a judgement of MUKERJI, J The facts of the case are fully stated in the judgements of the Court.

Babu *Benoy Kumar Mukerji* and Babu *Indu Bhushan Banerji*, for the appellant.

Mr. *A. Sanyal* and Munshi *Shiva Prasad Sinha*, for the respondent

The following judgements were delivered —

WALSH, A C. J , and BANERJI, J :—This is an appeal from a decision of the Judge in Companies (Winding Up). The claim is one made by the Jaunpur Sugar Factory, Limited (in liquidation), against the Upper India Rice Mills, Limited (in liquidation), for the sum of Rs 8,514-0-10, and has been admitted by the learned Judge. The view that he took was that the money which belonged to the former company was taken from their coffers by their managing agents, Behari and Company, and applied for the benefit of the latter company, whose managing agents were also the same firm, under such circumstances as not to amount to a loan, and that it was not recoverable except upon demand, and that no demand having been made until after the liquidation, namely the 24th of January, 1925, there was no debt until that date. and that, therefore, limitation could not begin to run before that date It was thought desirable that in the special circumstances the learned Judge himself should be a member of the Bench hearing the appeal. Certain additional facts were brought to our notice, which alter

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the complexion of the transaction. The series of transactions which actually took place clearly do not amount to an express loan. It was no part of the Jaunpur Sugar Factory's ordinary business to lend money No formal application was ever made to them for a loan. The managing agents who in this and other company transactions have been shown by other proceedings to have been thoroughly dishonest and untrustworthy, did as they liked with the funds of all the companies managed by them, and the firm itself and the said companies were under the complete control of one Bose, the moving spirit in all of them, and a Director of the Jaunpur Sugar Factory, Limited The moneys were taken from time to time in the form of cash, whenever it suited Bose to do so, and were entered as cash in the account of the Upper India Rice Mills, Limited, in the ledger. The fact that the agent was common to both principals would not, as the learned Judge has pointed out, exempt the principal, which took the benefit of money belonging to the other principal, from liability to return it The real question is—when did that liability arise? The dates between which the moneys were taken were the 19th of April, 1920, to the 26th of September, 1921 In their report and revenue account for 1922, signed by Bose himself as Director. these moneys were described as advances or loans. It may, therefore, be said that Behari and Company, as agents representing both the creditor and the debtor, intended them to be so regarded No doubt the true facts of the transaction had been deliberately kept from the Directors of both principals, but in such a case the law will always presume, or imply, a promise to repay. The Upper India Rice Mills Company, if they had been sued for the total amount due at the end of 1921, would have found themselves in this dilemma Either they had received the money and

applied it to their own purposes, rightfully, in which case a promise to repay it must be implied against them, or they had received it wrongfully by the secret and deceitful misapplication by their own agent of the Sugar Factory's money, in which latter case the money would be recoverable from them as "money had and received" to the use of the true owner. In our view they would have had no defence to an alternative claim, if it had been so made, at the end of 1921. In either case the period of limitation would be three years from the date of each actual payment. The rule is that the liquidator of a company which is in liquidation being a trustee for the creditors, time does not run after an order, or resolution, for winding up. The date for testing the liability is the commencement of the winding up. But in this case three years had already run when the Upper India Rice Mills, Limited, went into liquidation, namely in October, 1924. The result, therefore, is that the whole claim is barred and must be rejected. Under the circumstances each liquidator must pay his own costs out of the assets of the company with which he is concerned.

MUKERJI, J.:—This is a Letters Patent Appeal and the question for decision is one of pure law.

The facts are given in the judgement under appeal and have to be reiterated for the purpose of considering the point of law involved. A few years back, several limited companies were started under the auspices of a firm known as Behari and Company. They were managing directors of these companies. We are concerned here with two companies—one, the appellant here, is the Upper India Rice Mills, Limited, and the other is the Jaunpur Sugar Factory, Limited. Both were managed by Behari and Company. The business for which these two companies were floated is indicated by their names and it was no

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part of the business of any of these two companies to lend money or to act as bankers. For some reasons, which need not be detailed here, there was more money in the Jaunpur Sugar Factory than in any of the other companies. In order to continue the business of the Rice Mills, Behari and Company found it expedient to employ the money, which came into their hands as agents of the Sugar Factory, in the business of the Rice Mills. The result was that from time to time, money, which was the property of the Jaunpur Sugar Factory, was used for the business of the Upper India Rice Mills, Limited. The directors of these companies were ignorant of these transactions. Money was so used for the appellant company between the dates April, 1920, and September, 1921. Some entries signifying these transactions were made in the books of both companies. Both the companies went into liquidation. The Rice Mills went into voluntary liquidation in October, 1924, and the Sugar Factory was ordered to be compulsorily wound up on the 28th of March, 1924. The liquidators of the Sugar Factory found that some money had been utilized by the Rice Mills and they, therefore, asked the voluntary liquidator of the Rice Mills to pay up the sum. This was in January, 1925. The claim was repudiated on the ground that it was time-barred. There can be no doubt that, if three years' rule of limitation be applied from each of the dates on which money was employed for the purposes of the Rice Mills, the claim would be time-barred. The voluntary liquidator having repudiated the claim of the Sugar Factory, the matter was referred to me, as the Company Judge, and I held that the claim was not time-barred. In appeal, it is contended that this decision was erroneous.

It may be conceded that one and the same man, acting as an agent for two principals may, by his act alone, bind his principals, in certain circumstances.

For example, a commission agent, acting as the seller and purchaser of goods, may purchase for one party goods brought to him for sale by another party. But in this case, as already stated, it was no part of the business of the Sugar Factory to lend money and it is common ground that in lending the money—I am using the expression "lending" in its general and non-legal sense—the agents exceeded their power. The Rice Mills through their agents, must be taken to have known that such was the case. In the circumstances, I am still of opinion that there was, initially, no loan advanced by the Sugar Factory to the Rice Mills

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The act of the agent, in so lending out the money, was unauthorized. That being so, the Sugar Factory could sue to recover the money from the Rice Mills, only by adopting the transaction and by ratifying it. If the Sugar Factory repudiate the transaction, as it is entitled to do, they cannot sue the Rice Mills to refund For, then there is no privity of contract between them and the Rice Mills If the original transaction be ratified, it would become a good loan, and then all the consequences of a loan would follow and the claim would be time-barred.

If a claim be laid on the ground that, in using the money belonging to the Sugar Factory, the Rice Mills laid themselves liable to restore the benefit, on the principle involved in section 70 of the Contract Act, the Sugar Factory have to admit that what was done by their agent was done "lawfully," and article 62 of the Limitation Act would apply In any view of the case, the present claim cannot be maintained by the Sugar Factory without an admission on their part that the act of the agent was good enough for being accepted and ratified.

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It was, no doubt, open to the Sugar Factory to tell the agents that they had misapplied the money and they must make it good. The liquidators can do the same. But in such a case, there would be cast no liability on the Rice Mills to pay The Rice Mills may be liable to the agents of the Sugar Factory, but that is another matter

On further consideration, I agree in thinking with my learned colleagues that my judgement on the question of limitation was wrong But the reason is to be found in the fact that the source of the liability of the Rice Mills was not investigated, while I sat alone. It was not investigated even on appeal Indeed, the point was not even touched The liability was admitted throughout, except on the ground of limitation The sole point argued in appeal, as in the original court, was that the same agent could make a valid contract binding the principals—a proposition which I could not accept before and which I cannot accept even now, in the circumstances of the present case.

I agree in the order proposed.

Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Dalal, Mr. Justice Banerji, Mr. Justice Kendall and Mr. Justice Pullan.

AULAD ALI AND OTHERS (DEFENDANTS) *v.* ALI ATHAR (PLAINTIFF) AND NASIR-UD-DIN (DEFENDANT) * 1927 January, 31.

Act No. IX of 1872 (Indian Contract Act), sections 32 and 37—Act No. IV of 1882 (Transfer of Property Act) sections 14 and 40—Rule against perpetuities—Covenant running with the land—Contract—Uncertainty—Pre-emption

A deed of exchange was executed by *M* and *N*, in which, in lieu of certain property transferred by *N* to *M*, the latter transferred 7 annas 11 pies in village Gurdih Amma to *N*, retaining only 1 pie, and it was mutually agreed that if either party should wish to transfer his property in the village he should transfer it to the other, but if either transferred it to a third person, the other party should have a right to pre-empt. *N* having sold his property in the village in question in three separate lots, three suits for pre-emption were brought by the legal representative of *M*.

Held, that the suits would lie. The agreement upon which it was based was neither void for uncertainty nor offended against the rule against perpetuities, but on the contrary was a perfectly good agreement in law.

Muhammad Jan v. *Fazal-ud-din* (1), referred to. *Gopi Ram* v. *Jeot Ram* (2) and *Balli Singh* v. *Raghubar Singh* (3), overruled.

THIS appeal was referred to the Chief Justice with a view to its being heard by a Full Bench. The facts of the case are fully stated in the following order of reference.

LINDSAY and SULAIMAN, JJ.—We have decided that these cases ought to be referred to a Full Bench

* Second Appeals Nos. 381, 382 and 1544 of 1925, from 3 decrees of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 10th of November, 1924, reversing 3 decrees of Ilias Ahmad, Additional City Munsif of Azamgarh, dated the 7th of April, 1924.

(1) (1924) I.L.R., 46 All., 514. (2) (1923) I.L.R., 45 All., 478.
(3) (1923) I.L.R., 45 All., 492.

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for decision. The appeals arise out of three suits for pre-emption brought in the following circumstances :—

On the 1st of February, 1908, two persons, Muhammad Razi and Shah Nasir-ud-din, executed a document of exchange. At the time this document was written Muhammad Razi was the owner of an 8-anna share in mauza Gurdih Aimma and Shah Nasir-ud-din was the owner of the other 8-anna share in the same village.

Muhammad Razi transferred 7 annas and 11 pies out of his 8-anna share in this village to Nasir-ud-din. Muhammad Razi retained a 1-pie share, of which he granted a perpetual lease to Nasir-ud-din.

The situation after this transaction, therefore, was that Muhammad Razi was the owner of a 1-pie share in this village, while Nasir-ud-din became the owner of 15 annas and 11 pies.

When the deed of exchange was executed an agreement was entered into between Muhammad Razi and Shah Nasir-ud-din to the following effect, namely, that if either of the parties was desirous of transferring his interest in mauza Gurdih Aimma he should offer it, in the first instance, to the other party. It was further provided that if either party transferred to a stranger, then the other party would be entitled to pre-empt the property, in the case of a sale, at the rate of Rs. 8-5-4 per pie (English), and in the case of other transfers at the rate of Rs. 4-2-8 per pie (English).

What has happened now is as follows —

Shah Nasir-ud-din has by three separate deeds of sale transferred the 15 annas and 11 pies share which he owned in this village and three suits have been brought for pre-emption of these sales by one

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Saiyid Ali Athar who is the legal representative (sister's son) of Muhammad Razi who is now dead. The question which arises for decision in these three cases is whether the contract for pre-emption contained in the agreement of the 1st of February, 1908, is now enforceable The court of first instance dismissed the two suits out of which second appeals 381 and 382 of 1925 have arisen. In appeal the judgement of the trial court was reversed by the lower appellate court, which decreed the claim for pre-emption in each case In the third case, which gave rise to Second Appeal No. 1544 of 1925, the trial court had in the first instance dismissed the case, but after an order of remand passed by the lower appellate court it gave a decree for pre-emption which the lower appellate court subsequently affirmed on appeal

There has been a good deal of discussion in recent years in this Court regarding the enforceability of a contract of this kind and the Judges composing the present Bench are not in agreement upon the question whether a contract of this nature is enforceable as between the representatives of the parties to the contract We may refer in this connexion to the case of *Muhammad Jan* v *Fazal-ud-din* (1). It is not necessary for us to refer to the other cases in which one or the other view has been taken in this Court. We have no doubt that when the cases come up before the Full Bench the learned counsel on both sides will place all the relevant decisions before the Bench We make this reference accordingly, and in view of the fact that we both stand committed to definite opinions upon the question involved we think it right to say that we do not desire to be members of the Full Bench.

(1) (1924) I L R, 46 All, 514.

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Let this be laid before the Hon'ble Chief Justice for constitution of a Bench.

On this appeal—

Mr *B E O'Conor* and Maulvi *Mukhtar Ahmad*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

WALSH, A. C. J.—We are of opinion that this is a clear case and we agree with the judgement of our brother Mr Justice LINDSAY.

I propose to give my reasons as shortly as possible. The question arises out of a contract* which may be compendiously stated as one for exchange by the parties thereto of certain properties belonging respectively to each of them. It relates to a certain mauza, in respect of which Muhammad Razi transferred the whole of his interest, except one pie, and the parties entered into a mutual agreement as a fundamental condition of sale, that if either of them should wish to transfer the whole, or part, of his share in that mauza, that is to say, as regards the transferee Nasir-ud-din what he was taking under the document, and as regards the transferor Muhammad Razi the single pie share which he was reserving to himself, they might do so by transferring it from one to the other, but if either of them desired, or in fact attempted to transfer to a third person, the other party was to have the right to pre-empt. That is a perfectly harmless and natural mutual

* The relevant passage containing the pre-emption clause in the deed of exchange was as follows —

"I, Saiyid Muhammad Razi, cannot transfer the said share by sale or mortgage. If I, Saiyid Muhammad Razi, wish to transfer the remaining 1 pie (English) share or if I, Shaikh Nasir-ud-din, wish to transfer the whole or part of my share in mauza Gurdih aforesaid, we can transfer it among ourselves, that is, one executant can transfer it to the other. In case of transfer to another person, the other executant will acquire it by pre-emption on payment of consideration at the rate of Rs 8-5-4 for each pie (English) in case of sale and on payment of Rs 4-2-8 for each pie (English) in case of other transfers."

arrangement, very common in India, quite intelligible, the object being that so long as the parties to the transaction preferred to keep out third persons from the body of co-sharers, they should have a right of veto. In other words, it cannot be described better than as creating an obligation, imposing a restriction on the use of the land by each of the parties to this contract respectively. To my mind there is no uncertainty about such a contract. It is as clear and definite as language can make a contract, and with all respect to my brother SULAIMAN'S view, it seems to me that that is the fallacy underlying his opinion.

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I, therefore, think that section 32 of the Contract Act, which deals with contingent contracts, is a complete answer to the appellants' contention. The right springs into existence upon the happening of a contingency. There is nothing in the contract which offends against the law upon that subject. I am also clearly of opinion that section 37 confers that benefit and imposes the obligation upon the representatives of the parties if the parties should die before the contingency occurs, and I do not understand my brother SULAIMAN really to have denied that proposition.

Mr. *O'Conor* quite rightly, having regard to the state of the authorities on the point, relied upon the contention that this contract, and other similar contracts, offended against the rule against perpetuities. Having the advantage in India of having most of our law codified, it is always useful, both at the beginning and the end of a discussion, to look at what the Code says. The rule against perpetuity is codified in section 14 of the Transfer of Property Act, which begins in these words "No transfer of property can operate" Documents of mutual

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rights and obligations, contained in contracts, such as that with which we are here dealing, are not a transfer of property at all Therefore, section 14 clearly has no applicability. That would be a complete answer to the argument, were it not that two experienced Judges of this Court, in dealing on two previous occasions with this precise matter, followed a decision of the Bombay High Court in *Dinkarrao Ganpatrao* v. *Narayan Vishwanath* (1) and of the Madras High Court in *Kolathu* v *Ranga* (2). As the matter has been expressly referred to us for the purpose, it is our duty to express our opinion about those two decisions. They do not appear to have been based on any independent reasoning of the two learned Judges themselves. They adopt the view which had been laid down after a very elaborate consideration and judgement in Bombay. With great respect to the Judges who decided the Bombay case, it seems to me that they drifted into this fallacy. The learned Chief Judge's judgement complains that difficulty arises in India owing to the distinction that exists between the law in England and the law in India, namely, that the law in India does not recognize what is called the creation of an equitable interest in land arising from some inchoate transaction short of an actual transfer Having made that complaint, it seems to me that he somewhat illogically proceeded to supply the absence of which he complained by applying the equitable rule of "analogy to the statute" to pre-emption contracts which, although no equitable interest was created, he held should by analogy be treated as offending against the rule of perpetuities, as though they did create an equitable interest, and by analogy to

Walsh, A C J

(1) (1922) I L R , 47 Bom , 191. (2) (1912) I.L R , 38 Mad., 114.

section 14 of the Transfer of Property Act, must be treated as offending against the mischief prohibited in that section I am unable to agree with this view. I see nothing, either legal or equitable, offending or purporting in any way to offend against the rule, in such contracts as these I, therefore, am of opinion that the two cases decided in this Court, *Balli Singh* v. *Raghubar Singh* (1) and *Gopi Ram* v. *Jeot Ram* (2), having followed the Bombay case, were wrongly decided, and must be held as no longer binding in this province.

It is not immaterial to observe that in the *ratio decidendi* of the Bombay judgement, which was quoted by our learned brothers in both the cases they decided, to which I have just referred, the learned Chief Justice expressly stated that he regarded an obligation found in a contract of this kind as one which ran with the land, and also that it was not a mere personal contract which died with the person If those two views are correct, and I agree with them, and the rule against perpetuities does not apply, the question we have to answer is simple

I am inclined to think, though it is not necessary for the decision of this case, and not having fully considered the matter I prefer to say no more about it, that section 40 of the Transfer of Property Act, which deals with obligations imposing restrictions on the use of land, is also a complete answer to my brother SULAIMAN'S view.

The result is that we affirm the judgement of Mr. Justice LINDSAY and dismiss the appeal with costs.

DALAL, J —I agree. The view of Mr Justice SULAIMAN also is that a contract like the one before

(1) (1923) I L R, 45 All, 492 (2) (1923) I L R, 45 All, 478

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us does not offend against the rule against perpetuities, enacted in section 14 of the Transfer of Property Act,—see observations at pages 522 and 523 of *Muhammad Jan* v. *Fazal-ud-din* (1). His opinion was, in that case, that if a contract was for an unlimited period of time, it might be contended that it was unenforceable against the heirs and representatives as being too vague and uncertain An agreement, the meaning of which is not certain, or capable of being made certain, is void; and it is difficult to understand how a contract, which is valid at the time it was entered into, would become unenforceable as against the heirs and representatives as being too vague and uncertain. The principles enunciated in section 40, clause 2, of the Transfer of Property Act would apply here *A* contracts to sell Sultanpur to *B* While the contract is still in force, he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A* The short question for decision, therefore, before us is whether the contract of the 1st of February, 1908, was in force or not, at the date of the three sales objected to by the plaintiff. In my opinion the contract had not come to an end under any rule of law The plaintiff was, therefore, entitled to enforce the agreement between Muhammad Razi and Nasir-ud-din

BANERJI, J. :—I agree The rulings referred to by the learned Chief Justice, and reported in *Balli Singh* v *Raghubar Singh* (2), are really not distinguishable in principle from that decided by a Bench of this Court in the case of *Basdeo Rai* v *Jhagru Rai* (3). The question in this case is whether the contract entered into between the parties,

(1) (1924) I L.R., 46 All., 514 (2) (1923) I L R, 45 All, 402
(3) (1924) I L R, 46 All, 383

namely, that one of the parties should have the right to pre-empt in the case of a sale, is void on account of uncertainty or not I am clearly of opinion that a contract, which a party alleges to be a void contract, must be void *ab initio*, and such a contract cannot be treated to be valid up to a certain time and then treated as invalid Such a clause in the sale-deed is a clause which, although not amounting to an interest in the land, entitles the parties to it to the benefit of the obligations arising out of the contract. There is no difference in principle between a case where the parties entered into such a contract, so that it was enforceable for a hundred years, and the case where the contract comes into operation upon the happening of an event which, though uncertain in the sense that one does not know when one of the contracting parties will die, is certain, and arises when the property is sold I am, therefore, of opinion that the agreement is a good agreement in law

KENDALL, J :—I agree

PULLAN, J. :—I agree.

BY THE COURT :—The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr Justice Ashworth.

1927 January, 7.

ABDUL HAQ (APPLICANT) *v* SHEO RAM (OPPOSITE PARTY).*

Criminal Procedure Code, section 476—Civil Procedure Code, section 115—Order in appeal directing prosecution—Revision—Jurisdiction.

An appellate order passed under section 476B of the Code of Criminal Procedure is open to revision on the civil side and not on the criminal side of the High Court, the alterations in section 476 introduced by the Criminal Procedure Code (Amendment) Act, 1923, not having affected the arguments or the decision in the case of *In the matter of the petition of Bhup Kunwar* (1)

And this being so, the High Court, under section 115 of the Code of Civil Procedure, cannot interfere with a case where a Judge may have decided to prosecute on wrong or insufficient grounds *Banwari Lal* v *Jhunka* (2), referred to

THIS was an application in revision against an appellate order of the District Judge of Cawnpore directing the prosecution of the applicant for an offence alleged to have been committed in the Court of the Subordinate Judge, who himself had refused to prosecute. The facts of the case sufficiently appear from the judgement of the Court.

Mr. *A. P. Dube*, for the applicant.

Pandit *Uma Shankar Bajpai*, for the opposite party.

ASHWORTH, J.:—This is an application in revision under section 115 of the Code of Civil Procedure, made by one Abdul Haq against an order of Mr. L. S. White, District Judge of Cawnpore, on

* Civil Revision No 79 of 1926

(1) (1903) I.L.R., 26 All., 249 (2) (1925) 24 A.L.J., 217

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the 6th of March, 1926, allowing an appeal against an order of the Subordinate Judge of Cawnpore who refused to make a complaint under section 476 of the Code of Criminal Procedure for the prosecution of the present applicant Abdul Haq on the ground of perjury.

The facts are as follows:—Three brothers claimed certain property. They had not sufficient means to bring and prosecute a suit for the same. Accordingly they made an arrangement with Abdul Haq that he would finance them. The arrangement was recorded in a sale-deed of a share of the interest of the three brothers in the property claimed. There was a stipulation in this deed that Abdul Haq, in the event of the suit being successful, would not be entitled to any share of any costs that might be awarded by the civil court. A decree was passed on the 22nd of January, 1925, in favour of the three brothers and of Abdul Haq and the decree provided for the plaintiffs getting their costs. No apportionment was made of these costs and no stipulation in the decree was entered that Abdul Haq should not be entitled under the decree to any share in these costs Subsequently by an application, dated the 30th of April, 1925, Abdul Haq asked to be allowed to realize the whole of the costs which had been deposited in court, saying that he was himself entitled to one-half of them. Presumably this application must be interpreted to mean that as a joint decree-holder he was entitled under the decree to realize the whole costs but that under some arrangement with the other decree-holders he would only be entitled to retain one-half of those costs and would be bound to pay the other half over to the other decree-holders. The execution court, whose attention had been drawn by this time to the sale-deed by the three brothers in favour of Abdul Haq

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which resulted in Abdul Haq being a plaintiff in the civil court, asked Abdul Haq to explain how in view of the stipulation in that sale-deed he could be entitled to any costs. Apparently his explanation was satisfactory, or else the execution court ultimately considered that it could not go into the matter as an execution court. Anyway, an order was passed allowing Abdul Haq to take the costs deposited.

Now one of the three brothers had gone to South Africa. One of the other two put in an application to the Subordinate Judge complaining that Abdul Haq had committed perjury in his application of the 30th of April, 1925, which application was verified by an affidavit, in stating that he was entitled to half the costs, and asking the Subordinate Judge to make a complaint to the criminal court for his prosecution in respect of this perjury. The Subordinate Judge rejected this application, but the District Judge of Cawnpore on appeal passed an order allowing the appeal and stating that he would himself make a complaint to the District Magistrate. It is against this order that this application in revision is filed.

Abdul Haq at first brought the matter in revision to this Court under section 439 of the Code of Criminal Procedure. The present Acting Chief Justice by an order, dated the 4th of May, 1926, expressed an opinion that the District Judge of Cawnpore should not have made the order that he did in the circumstances, but he held that an application in revision did not lie to the High Court on the criminal side. He allowed Abdul Haq to re-present his application on the civil side without any further payment of stamp or fee.

It is incumbent on me to accept the view that the application in revision must be presented on the civil side. I would refer to the Full Bench ruling

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in *In the matter of the petition of Bhup Kunwar* (1) I concur with the view of SULAIMAN, J., in *Banwari Lal* v. *Jhunka* (2) that the alterations in section 476 introduced by the Criminal Procedure (Amendment) Act, 1923, have not affected the arguments or the decision in the Full Bench case referred to.

It is clear to me that, having regard to the language of section 115 of the Code of Civil Procedure, no revision of the District Judge's order can be made on the civil side. I concur with the view of the Acting Chief Justice that in the circumstances of this case it is not proper to order the prosecution for perjury of Abdul Haq, but this opinion must remain a mere *obiter dictum*. The order of the District Judge may have been based on a faulty appreciation of the facts or may have been based on a faulty view of the law. I mean that Abdul Haq in his application, where he stated that he was entitled to realize the costs, may have meant that legally he was entitled as a joint decree-holder to realize the costs under the decree. Be this as it may, the District Judge has not in my opinion exercised a jurisdiction not vested in him or failed to exercise a jurisdiction vested in him. Nor again has he acted illegally or with material irregularity in the exercise of his jurisdiction to accept the appeal under section 439 (*b*) of the Code of Criminal Procedure.

It appears to me that some alteration of the law is desirable to obviate the undesirability of such an application as this being dismissed on the ground that it cannot be entertained under section 115 of the Code of Civil Procedure. The real position appears to be this. Section 476 is part of the Code of Criminal Procedure and the legislature, when drafting it, doubtless considered that sections 436 to 439 of the Code

(1) (1902) I L R., 26 All., 240. (2) (1925) 24 A L J., 217.

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of Criminal Procedure would operate to afford means whereby the High Court could set aside such an order now impugned if it thought fit. Unfortunately by reason of the Full Bench decision of this Court it is not sections 435 to 439 of the Code of Criminal Procedure that will govern such an application in revision but section 115 of the Code of Civil Procedure. The language of section 115 is too narrow to meet the case where the Judge by his order decides to prosecute the person on insufficient grounds or on wrong grounds. The consequence is that an application like this has to be rejected and what appears likely to be an abortive criminal suit has to be allowed to take place.

For the reasons stated this application is dismissed but, in the circumstances, I make no orders as to costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr Justice Dalal and Mr. Justice Pullan

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January, 12.

ONKAR MAL (DEFENDANT) *v* ASHIQ ALI (PLAINTIFF)*

Act No. IX of 1872 (Indian Contract Act), section 23—Stifling a criminal prosecution—Compromise—Incidental withdrawal of a petty charge of theft

A compromise which is otherwise a fair and reasonable one is not invalidated because in connexion therewith a trifling charge of theft between the servants of the parties has been withdrawn. *Dwijendra Nath Mullick* v. *Gopi Ram Gobindaram* (1), followed

THE facts of this case sufficiently appear from the judgement of the Court

* Second Appeal No 889 of 1924, from a decree of Ray Nath Das, Second Additional Judge of Gorakhpur, dated the 15th of February, 1924, reversing a decree of Harihar Prasad, Additional Subordinate Judge of Gorakhpur, dated the 21st of November, 1923.

(1) (1925) 29 C W N, 855

Mr. *A. Sanyal*, for the appellant.

Maulvi *Mukhtar Ahmad*, for the respondent.

DALAL and PULLAN, JJ. :—The plaintiff sued to have a certain compromise, which he entered into during partition proceedings in the revenue court on the 22nd of July, 1921, cancelled. His other reliefs were not granted, so it is not necessary in this Court to consider them. The trial court dismissed the suit, but it was decreed by the lower appellate court The defendant Onkar Mal has come here in second appeal.

The foundation of the plaintiff's claim in the plaint was that he was induced to enter into the compromise by undue influence, because at the time of the compromise a criminal charge brought by a servant of Onkar Mal was pending against the plaintiff's servants and Onkar Mal offered the inducement of withdrawing that complaint It is a fact that a criminal prosecution on some petty theft was pending in the criminal court and the case was withdrawn on the day that the compromise was entered into The fact that the case was withdrawn indicates that the charge of theft must be of a trifling nature The only relevant matter in the judgement of the lower appellate court is the last paragraph printed at page 18 of the printed record It held that undue influence was not proved It, however, thought out a new case for the plaintiff and held that the compromise failed because it was void. It held it to be void because it was a stifling of a criminal prosecution.

The compromise, as held by the trial court, was a very fair one. Onkar Mal was in possession of three bighas in excess of his one-anna share The plaintiff was the owner of the seven-anna share This seven-anna share had been leased to another person by the plaintiff's vendor prior to the sale in favour of the

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ONKAR MAL v. ASHIQ ALI

plaintiff Under the compromise the lessee gave up possession, though it was arranged that for the period of the lease he was to receive the profits of the seven-anna share of the property As to the three bighas in possession of Onkar Mal in excess of his share, he promised under the compromise to pay rent for it to the plaintiff One of the motives for that compromise may have been the withdrawal of the criminal case, but it cannot be said to be the only motive There was no unfairness in the agreement between the parties When a withdrawal of a criminal case of a trifling nature like the one pending against the plaintiff's servants is one of the motives for a compromise, it would not follow that the compromise would for that reason be void In *Dwijendra Nath Mullick* v *Gopiram Gobindaram* (1) a Bench of the Calcutta High Court held that where the withdrawal of a prosecution was the motive but not the object or the consideration of the agreement, the agreement would not be rendered void under section 23 of the Indian Contract Act In the present case the withdrawal of the prosecution was not the consideration for the agreement The agreement was a fair settlement of a dispute between the parties and would possibly have been arrived at even if there had been no criminal prosecution pending at the time against the plaintiff's servants

We set aside the decree of the lower appellate court and restore the decree of the trial court and dismiss the plaintiff's suit with costs of all the courts

Appeal allowed

(1) (1925) 29 C W N , 855

Before Mr. Justice Boys and Mr. Justice Kendall

HUB LAL (PLAINTIFF) *v.* GULZARI LAL (DEFENDANT).* 1927 January, 21

Civil Procedure Code, section 11—Res judicata—Wrong decision on a point of law—Pecuniary jurisdiction—Bearing of the question of pecuniary jurisdiction on the application of the doctrine of res judicata.

It is not a correct proposition of law that the pecuniary jurisdiction of the trial court has no bearing on the application of the principle of *res judicata*, where the pecuniary jurisdiction of the court which tried the first suit was not sufficient to enable it to try the second, the principle of *res judicata* will not apply.

Shahzade Singh v. *Muhammad Mehdi Ali Khan* (1) and *Sheikh Hasan* v. *Ram Kumar Singh* (2), referred to.

An erroneous decision on an issue of law can be the basis of a plea of *res judicata*. *Mangalathammal* v. *Narayanswami Aiyar* (3), dissented from.

THE facts of this case sufficiently appear from the judgement of the Court.

Pandit *K. N. Laghate*, for the appellant.

The respondent was not represented.

BOYS and KENDALL, JJ.:—This is a plaintiff's appeal in a suit for damages on the allegations that the defendant had wrongfully cultivated the plaintiff's share, a joint holding, and that the defendant had further cut certain trees and taken certain fruit from groves belonging to the plaintiff. We will deal first with the question of joint tenancy. The trial court held that the plaintiff's joint ownership of the tenancy was *res judicata*, and decreed the plaintiff's claim, allotting him Rs. 531-10-0 as damages. It is admitted on behalf of both parties that there were

*Second Appeal No. 65 of 1925, from a decree of Mohammad Ziaul Hasan, Subordinate Judge of Mainpuri, dated the 14th of November 1924, reversing a decree of Ghanshyam Das, Munsif of Etawah, dated the 21st of December, 1923.

(1) (1909) I.L.R., 32 All., 8. (2) (1894) I.L.R., 16 All., 182.
(3) (1907) I.L.R., 30 Mad., 461.

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two previous suits in 1916 and 1920, in which the question of ownership had been decided in favour of the plaintiff. The lower appellate court, however, held that the matter was not *res judicata* because the plaintiff's title was based on his acquisition by sale and foreclosure of a certain share in an occupancy holding, and that such a title was void under the provisions of the Tenancy Act. It further held that a wrong decision on a point of law could not be the basis of a plea of *res judicata*, and in support of this proposition it relied on the decision of the Madras High Court in *Mangalathammal* v *Narayanswami Aiyar* (1) in which it was held that

"It has long been settled by authority in this Court and cannot, we think, now be questioned that the erroneous decision by a competent tribunal of a question of law directly and substantially in issue between the parties in a suit does not prevent a court from deciding the same question arising between the same parties in a subsequent suit according to law."

We are, however, unable to concur in this expression of opinion. In our view, the words of section 11 of the Code of Civil Procedure are clear that "No court shall try any suit in which the matter directly and substantially in issue has . . ." There is, in our view, nothing in these words to limit the matter in issue to an issue of fact. On behalf, however, of the respondent a further reason has been urged in support of the plea that the matter was not *res judicata*. This reason is that while the first suits were within the competency of the court which tried them, that court could not have tried the present suit by reason of the fact that the valuation of the suit was in excess of the pecuniary jurisdiction of the court which tried the earlier suits. The facts as regards the pecuniary jurisdiction of the two courts are not denied

(1) (1907) I L R, 30 Mad., 461

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by the appellant. We think, therefore, that the respondent's contention must be accepted that the first court was not competent to try the present suit It is not sufficient that the first court should have been competent to try one or other of the issues. Section 11, when split into its two parts, is clear, firstly, that "*No court shall try any suit* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a court *competent to try such subsequent suit* and has been heard and finally decided by such court," and, secondly, that "*No court shall try any issue* in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between the parties under whom they or any of them claim, litigating under the same title, in a court *competent to try the suit in which such issue has been subsequently raised*, heard and finally decided by such court." It is clear, when the section is thus split up, that in both cases the trial court must have been competent to try the later suit and not merely an issue in the later suit On behalf of the appellant reliance has been placed on *Shahzade Singh* v. *Muhammad Mehdi Ali Khan* (1) as supporting the proposition that the pecuniary jurisdiction of the trial court has no bearing on the application of the principle of *res judicata*. We think, however, that this contention is unfounded. In that case it was urged that the fact that the trial court, a revenue court, had only jurisdiction up to Rs 100, and the suit in the later civil court was valued at Rs. 250 did not prevent the application of the principle of *res judicata*, but the *ratio decidendi* was not that the question of the valuation of the suit

(1) (1909) I L R. 32 All., 8

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was immaterial, but that the revenue court deciding the question of title must be deemed to be the civil court of lowest jurisdiction which would have been competent to try the suit, if the parties had been referred to a civil court. If it were to be deemed such civil court, that civil court would have had power to try the later suit. The case, therefore, does not support the contention of the appellant. On the other hand, we have been referred by the respondent to *Sheikh Hassu* v. *Ram Kumar Singh* (1). We think, therefore, that though the rejection of the plea of *res judicata* cannot be supported for the reason given by the lower appellate court, yet for the other reason which we have stated the question of the plaintiff's title was not *res judicata*. If the matter then is open to decision in the present suit, there can be no question but that the plaintiff did not, in virtue of the terms of the Tenancy Act, acquire a title in the occupancy holding by his sale and foreclosure. That being so, his claim for a declaration of his share and damages must fail.

We now turn to consider the plaintiff's claim so far as it concerns the groves and damages for cutting the trees and taking the produce of those groves. The trial court held that in certain suits between the parties the land in question had been held to be groves. In this case it did not hold that the matter was *res judicata*, but went on to say that there was no reliable evidence to the contrary. It further held that the prior suits showed that the plaintiff owned all of the groves except two of them, and finally on the evidence held that the defendant was in possession and had taken the produce; and it gave the plaintiff damages in two amounts of Rs. 141-2-9 and Rs. 93-5-4. The lower appellate court did not refer in regard to

(1) (1894) I.L.R., 16 All., 163.

these matters to the prior suits or to the question of *res judicata*, but in view of our decision above as to the application of the principle of *res judicata* to the joint tenancy it is clear that the lower court was right so far in its dealing with these issues. It did, in fact, reject the plaintiff's claim on the ground that there had been a partition in 1917. No attack on the finding in this respect has been made before us in appeal, and it is, therefore, unnecessary for us to further consider this question. The lower appellate court, after considering the partition and matters bearing thereon, arrived at the conclusion that "the plaintiff respondent has totally failed to substantiate his claim". The result is that the appeal fails in its entirety, and is dismissed with costs.

Appeal dismissed.

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HUR LAL v. GULZARI LAL.

Before Mr. Justice Dalal and Mr. Justice Pullan.

HUSAINI BEGAM (PLAINTIFF) v. MUHAMMAD MEHDI (DEFENDANT).*

1927

January, 21.

Muhammadan law—Shias—Will—Legacy—Consent of heirs—Death of legatee in lifetime of testator.

According to the Shia law a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs, but where it exceeds one-third it is not valid without the consent of all the heirs. Such consent may be given either before or after the death of the testator.

If a legacy is not addeemed by the testator, the death of the legatee does not cause a lapse, but the legacy descends to the legatee's heirs.

Fahmida Khanum v. *Jairi Khanum* (1), referred to.

THE facts of this case sufficiently appear from the judgement of the Court.

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* First Appeal No. 4 of 1924, from a decree of Harnarain Prasad Verma, Subordinate Judge of Bijnor at Moradabad, dated the 18th of September, 1923.

(1) (1908) I. L. R., 30 All., 153.

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HUSAINI BEGAM v. MUHAMMAD MEHDI

Mr *Nihal Chand* and Maulvi *Mukhtar Ahmad*, for the appellant.

Dr *Surendra Nath Sen* and Mr. *Syed Moham mad Husain*, for the respondent.

DALAL and PULLAN, JJ —This is an appeal by a Muhammadan lady, Musammat Masiti Begam, against a decree of the Subordinate Judge of Moradabad, who dismissed her suit for possession of the village of Hakimpur Qazi, which she sought to obtain from her nephew Saiyid Muhammad Mehdi The case turns entirely on the question whether this property has been validly bequeathed to Muhammad Mehdi by the will of his maternal grandmother, Musammat Murtazai Begam It is admitted on both sides that if the will were set aside, the plaintiff who is the only surviving daughter of Musammat Murtazai Begam, would be entitled to the whole of her property by inheritance As it is, she has obtained the rest of the property left by her mother; but this property has been denied to her, as it was bequeathed by will to her sister, Musammat Husaini Begam, and is now in possession of the latter's son.

In the lower court the plaintiff actually denied the existence of the will; but this matter is not now in issue Undoubtedly, the will was executed by Musammat Murtazai Begam in the year 1897. Apart from this objection, the will has been challenged in this Court on the ground that it is invalid under Shia law, because it purported to transfer more than one-third of the testator's estate. Reliance is placed on a ruling of this High Court in *Fahmida Khanum* v. *Jafri Khanum* (1) According to the head-note of that ruling, where a legacy exceeds one-third of the estate, it will not be valid to any extent unless the consent of the heirs, given after and not before the

(1) (1908) I L R, 30 All., 153

death of the testator, has been obtained. In this case, the consent of the other heirs was undoubtedly obtained to the will at the time of its execution, but it is not proved that there was any such consent after the testator's death. The respondent denies that the property bequeathed is more than one-third of the whole estate of Musammat Murtazai Begam. and the evidence on the question is not conclusive, but we are of opinion that the ruling cited by the appellant can be distinguished from the case before us, for there one of the heirs of the testator was excluded entirely from inheritance, and in this case a certain portion is left to each of the heirs. We consider that that ruling should be confined to the case which it was designed to meet, and not applied to every case in which a Shia testator bequeaths more than one-third of his estate. The commentators to whom we have access are all of opinion that the consent required under Shia law may be obtained before the death of the testator. Ameer Ali, in the first volume of the 4th edition of his book "Muhammadan Law," page 592, writes :—

"According to the Shia law . a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs; but where it exceeds one-third, it is not valid without the consent of all the heirs Such consent may be given either before or after the death of the testator"

The same opinion is given by Mr Tyabji in his book "Principles of Muhammadan Law," 2nd edition, page 784, and we consider that this is the view which we should follow in the present case

Another question raised is whether the legacy can be valid, as the original legatee, Musammat Husaini Begam, died in the year 1902, many years

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before her mother. Baillie in his "Digest of Muhammadan Law," page 247, writes as follows —

"In all cases of bequest, where the legatee happens to die before the testator, some doctors are of opinion that the legacy is void, but others have maintained that, although if the testator should retract the bequest, it would be null, whether the retraction takes place before or after the death of the legatee, yet if there is no retraction, the legacy descends to the heirs of the legatee This of the two reports is most authentic and approved"

Ameer Ali takes the same view, at page 614 of volume I of "Muhammadan Law," where he distinguishes between Hanafi and Shia laws On this point, he says—

"If the legacy is not addeemed by the testator, the death of the legatee does not cause a lapse It descends to the legatee's heirs"

In the present case the will was assailed on every possible ground, consequently it is only natural that evidence was adduced to show that the will was revoked by Musammat Murtazai Begam

[After discussig the evidence, the judgement concluded thus —]

In our opinion the story of the revocation of the will is improbable, and the reasons assigned for it are insufficient. We consider that the will is a valid will that stands unrevoked, and that the plaintiff is not entitled to the property for which she has brought this suit.

We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Ashworth.

EMPEROR v SUDAMAN AND OTHERS *

1927
January, 23

Criminal Procedure Code, sections 435, 438 and 439—Revision—Sessions Judge making a reference on the merits—Criminal Procedure Code, sections 253 and 342—Examination of accused—Accused examined at wrong stage of trial—Irregularity.

A Sessions Judge sitting in revision should not make a reference to the High Court if his only objection to the finding of the court below is based on the merits, unless it is very clear that the conviction is wrong and there can be no reasonable doubt of the matter.

Where a magistrate examines an accused at a wrong stage in the trial, this is not an illegality which will necessarily vitiate his proceedings, but it will only affect them if the fact that the examination of the accused was taken at the wrong time has occasioned a failure of justice

Mitarit Singh v *King-Emperor* (1) and *Varisai Routhen* v *King-Emperor* (2), referred to

THIS was a reference made by the Sessions Judge of Ghazipur. The facts of the case sufficiently appear from the judgement of the Court

Munshi *Ram Nama Prasad*, for the applicant

The opposite party was not represented

ASHWORTH, J. —This case has been reported by the Sessions Judge of Ghazipur under section 438 of the Code of Criminal Procedure on the ground that the proceedings of the Magistrate in convicting the accused were illegal by reason of non-compliance with section 342 of the Code of Criminal Procedure. The Sessions Judge has further expressed the opinion that he was not justified in interfering with the Magistrate's finding of fact, but that, if he had been so justified, there were reasons for holding that the conviction was improper The illegality in procedure

* Criminal Reference No. 626 of 1926

(1) (1921) 6 Pat. L. J., 844 (2) (1922) I L. R. 46 Mad., 449

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complained of is this. The case was a warrant case The law permits the court, after the examination-in-chief of the prosecution witnesses or some of the prosecution witnesses, to examine the accused. The examination of the accused at this stage is obviously, from the context, an examination intended to enable the court to decide whether it should frame a charge (section 253 of the Code of Criminal Procedure) There may be cases where the Magistrate sees an easy answer to the prosecution evidence and desires that answer to be given by the accused before he discharges the accused. If the Magistrate frames a charge the accused is then given an opportunity of cross-examining the prosecution witnesses that have been heard The remaining witnesses, if any, for the prosecution are then examined and cross-examined and last of all the accused shall be called upon to enter upon his defence and produce his evidence (section 256 of the Code of Criminal Procedure) Section 342 adds something further to section 256. It requires the court to question the accused generally on the case just before the accused is called upon to enter upon his defence. In this case the Sessions Judge states that the Magistrate questioned the accused under section 342 not just before he was called on for his defence but at the stage when the accused should have been questioned merely with a view to enable the Magisstrate to decide if it was necessary to frame a charge The Sessions Judge, relying on the case of *Mitarjit Singh* v. *King-Emperor* (1), has held that this defective procedure was prejudicial to the accused because the prosecution witnesses were warned before their cross-examination of the weak points in the prosecution evidence He has also followed this ruling in holding that the

(1) (1921) 6 Pat L. J., 644.

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defect was an illegality which could not be excused under section 537 of the Code of Criminal Procedure. On the other hand, the Magistrate has cited a decision in *Varisai Rowther* v *King-Emperor* (1) as taking a different view to that held by the Patna High Court. In this decision a Full Bench, with one dissentient, held that if the accused is examined as permitted by section 253 he need not be examined again after the cross-examination and re-examination of the witnesses already heard, unless new witnesses are heard after the examination under section 253. Even in this case it was held that any irregularity could be excused under section 537 of the Code of Criminal Procedure.

It appears to me that the intention of the law is that the accused should be examined just before he enters on his defence and produces his witnesses, i e , after all the prosecution witnesses have been completely done with.

At the same time it seems to me clear that any irregularity in this direction will come within the purview of section 537 and will only call for interference, if it has occasioned a failure of justice. In the present case there is no ground for holding that there was any failure of justice occasioned by reason of this irregularity.

I should, therefore, reject the reference of the Judge so far as it asks me to interfere on the ground of irregularity of proceedings by the Magistrate.

The Sessions Judge has stated that he is justified in interfering with a conviction on the merits. This does not appear to me correct. Under section 435 he may examine the record of an inferior criminal court for the purpose of satisfying himself as to the propriety of any finding and, if satisfied that any finding is improper, may report it to this Court

(1) (1922) I L R , 46 Mad , 449

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The power of this Court to interfere on the merits is undoubted, but this Court will not exercise its power so as virtually to give a right of appeal, and in reporting a case under section 435 the Sessions Judge must bear in mind this limitation which exists in practice as regards the exercise of the High Court's power of revision under section 439 of the Code of Criminal Procedure. A case should not be reported on the ground that a conviction is bad on the merits unless it is very clear that the conviction is wrong and that there can be no reasonable doubt of the matter.

In the present case the Sessions Judge has impugned the conviction by the Magistrate on three grounds. The first ground is that prosecution witnesses had something in common with the complainant and had some reason to be on bad terms with the accused. Another ground is that the presence of the witnesses on the spot in time to see the accused causing damage to the crops (mischief being the offence charged) was not explained sufficiently. A third reason was that the evidence of a commissioner who saw the crops a month after the event was insufficient for the purpose of holding that that damage had been caused by the accused.

I consider that the reasons given by the Sessions Judge for doubting the propriety of the conviction are not such as to justify interference by this Court in revision. To interfere on these grounds would, in my opinion, be undistinguishable from allowing an appeal

Accordingly I direct that the record be returned.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Pullan

KISHAN LAL AND ANOTHER (PLAINTIFFS) *v.* TIKA AND ANOTHER (DEFENDANTS)* 1927 January, 25

Act No. IX of 1908 (Indian Limitation Act), section 14—filed in wrong court owing to bonâ fide mistake of appellant.

An appellant through a *bonâ fide* mistake, probably caused by erroneous advice given to him by his pleader, filed an appeal in a court which had had jurisdiction to entertain it once, but not long previously ceased to have such jurisdiction. As soon as his mistake was pointed out to him he lost no time in presenting his memorandum of appeal to the right court; but by that time the appeal was on the face of it barred by limitation.

Held, that section 14 of the Indian Limitation Act 1908, applied and the appellant was entitled to exclude the time which he had spent in taking his appeal to the wrong court. *Maqbul Ahmad* v. *Murla* (1) and *Brij Indar Singh* v. *Kanshi Ram* (2), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Panna Lal*, for the appellants.

Dr. *N C. Vaish*, for the respondents.

DALAL and PULLAN, JJ. :—The lower court threw out this appeal on the ground that it was barred by limitation. The suit relates to the tahsil of Sikandrabad which is situated in the Bulandshahr district, but was up to the year 1921 in the jurisdiction of the District Judge of Meerut. This suit was decreed on the 28th of November, 1923, and on the 10th of

* Second Appeal No 1584 of 1924, from a decree of Hari Har Lal, District Judge of Bulandshahr, dated the 23rd of May, 1924, confirming a decree of Kedar Nath Mehra, Munsif of Ghaziabad, dated the 28th of November, 1923

(1) (1916) 14 A L J , 212 (2) (1917) 15 A L J , 777,

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January, 1924, an appeal was preferred in the court of the District Judge of Meerut. The Munsarim of that court accepted the appeal and it was made over to an Additional Judge for trial. Consequently it was not until the 10th of March that it was discovered that the appeal should have been filed in the court of the District Judge of Bulandshahr. The appeal was then returned to the plaintiff, who took it without delay to the proper court. We have to consider whether in a case of this kind the appellant should be punished for what must have been a mistake of his counsel. As far as he was concerned, it was clearly a *bonâ fide* mistake and he has throughout prosecuted his case with diligence. It is not, in our opinion, improper to apply the provisions of section 14 of the Limitation Act to a case of this kind although it is an appeal, and in our opinion we are justified in holding that this was a *bonâ fide* mistake, that the appellant throughout acted in good faith and that his appeal should be heard. There is an authority for this view in the ruling in *Maqbul Ahmad* v. *Murla* (1) and we believe that we are acting in accordance with the principles laid down by their Lordships of the Privy Council in the case of *Brij Indar Singh* v. *Kanshi Ram* (2).

We, therefore, allow this appeal and remand the case to the lower appellate court for decision on the merits. The costs will follow the result.

Appeal allowed.

(1) (1916) 14 A L J, 219 (2) (1917) 15 A L J, 777

Before Mr Justice Dalal and Mr Justice Pullan

MUHAMMAD SIDDIQ AND ANOTHER (PLAINTIFFS) v. SHAHAB-UD-DIN AND ANOTHER (DEFENDANTS).* 1927 January, 25

Muhammadan law—Dower—Liability of father of minor son who gives his consent to the marriage

A Muhammadan father does not, by simply giving his consent to the marriage of his minor son, without making himself a surety for the payment thereof, become liable for the payment of his daughter-in-law's dower.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Mr *Akhtar Husain Khan* and Mr. *A. M. Khwaja*, for the appellants.

Maulvi *Mushtaq Ahmad*, for the respondents.

DALAL and PULLAN, JJ.:—The parents and heirs of a deceased wife sued the deceased's husband and the husband's father for recovery of their share of the dower debt The suit was decreed against the son alone, who does not appear to own any property. The plaintiffs have come here in second appeal to obtain a decree against the father Both the subordinate courts have held it as a finding of fact that the father was not a surety for the payment of the debt at the time of the marriage. The husband was a minor at the date of the marriage, which was arranged by the father The question which arises is whether the father by his consent to the marriage becomes a surety for the payment of the dower debt fixed at the time It would appear from a statement in Mr. Tyabji's "Principles of Muhammadan Law," second edition, page 179, section 104 (1), that his becoming such a

* Second Appeal No 1535 of 1921, from a decree of E Thurston, District Judge of Budaun, dated the 3rd of July, 1924, confirming a decree of Pran Nath Agha, Munsif of East Budaun, dated the 21st of December, 1923

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surety would be presumed What he says is that where the marriage has been contracted on behalf of a minor of the male sex by his guardian for marriage, the property of the minor is liable for the dower, and, if he has no property, the guardian is liable to pay it to the wife. The statement is not very clear, but possibly it means that the guardian would be perpetually liable and not only till the minor attains the age of majority according to Muhammadan law, i.e , on his reaching puberty Unless such were his opinion it will not help the appellants, because obviously the son was sixteen years of age at the time of the death of the plaintiffs' daughter and was a major according to Muhammadan law As pointed out by the learned Judge of the lower appellate court, Mr. Tyabji, who as a rule gives Baillie for his authority, has not given any reference to that authority in support of this particular opinion of his. We have referred to Baillie's book, edition 1875. What he says at page 141 is that when a man has married his infant son to a woman, and becomes his surety for the dower, and the transaction has taken place while the father was in good health, the suretyship is valid if accepted by the woman. The conditions for the liability of the father according to this authority are his becoming a surety, his being in good health and the acceptance by the bride We are of opinion that if this authority had desired to lay down in accordance with the text that a father simply by giving his consent to the marriage automatically becomes a surety for the payment of the dower debt, he would not have laid down this rule of the father becoming a surety at the time of the marriage and the other conditions attached to the validity of such surety. It may be admitted that the passage from Ameer Ali quoted by the lower appellate court is not helpful, because

there the question considered is only of the death of the son without leaving any property, and no statement is made as to the liability of the guardian who gave the consent if the son did not happen to possess any property. At the same time if there had been such a tenet of Muhammadan law as to make a guardian of the minor bridegroom liable for the payment of dower debt, simply because he arranged the marriage and gave his consent, a statement to that effect would have been found in Ameer Ali's book. In consideration of all these points we are not prepared to follow the principle of law laid down in section 104 of Mr. Tyabji's book.

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MUHAMMAD ABDUL KADIR v. SAKINA BIBI

We dismiss this appeal and make no order as to costs

Appeal dismissed.

REVISIONAL CIVIL

Before Mr Justice Mukerji.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (DEFENDANTS) *v.* DWARKA PRASAD (PLAINTIFF).*

1927 February, 8

Act No. 1 of 1872 (*Indian Evidence Act*), *section* 106—*Burden of proof—Negligence—Property adjacent to railway line burnt by spark from engine—Liability of railway company.*

On suit against a railway company based on the allegation that certain property belonging to the plaintiff, being at the time near the railway line, had been destroyed by reason of sparks flying from an engine: *held* that it was on the railway company to show that they had taken proper precautions to avoid damage to property adjacent to the line by reason of sparks from engine.

THE facts of this case sufficiently appear from the judgement of the Court.

* Civil Revision No 149 of 1926

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. DWARKA PRASAD

The Government Advocate (Mr *G. W. Dillon*), for the applicants

Munshi *Girdhari Lal Agarwala*, for the opposite party.

MUKERJI, J.:—This is an application to revise a judgement of the court of small causes at Aligarh by which the respondent's suit for damages was decreed against the Secretary of State as represented by the Agent of the East Indian Railway.

The respondent's case is that his *dhobi* lived near the railway line. On the morning of the 27th of May, 1925, two trains were running a race on the railway lines that ran by the *dhobi's* house One of the trains was going to Delhi and the other to Bareilly and for a short distance the two trains ran parallel to each other. A spark from one of the engines burnt the thatched hut of the *dhobi* and along with the hut the plaintiff's clothes that had been given to the *dhobi* for being washed

The court below found that the two drivers were driving the two trains at a furious speed and the spark which caused the fire came out of one of the engines It also found that no precaution had been taken to protect the flying of sparks from the engine

In this Court it has been contended that the finding of the learned Judge on the question of race is perverse and that it had been established that the engines were fitted with spark protectors and the railway was not negligent

On the first point On the evidence it is difficult to believe that the two trains were really running a race. The *dhobi's* hut was situated only a furlong off the railway station and the station master's evidence is to the effect that the two trains left within three

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minutes of each other In the circumstances it is difficult to believe that the trains could raise up speed so as to run a race within a furlong of the station

But the main question is whether there was negligence on the part of the railway. There can be no doubt that the fire was caused by a spark from an engine, so, race or no race, the railway would be liable, if it had failed to take all reasonable precaution to avoid emission of such sparks as are likely to destroy the adjoining property Mr. Dillon, the learned Government Advocate, argued on the authority of a statement of law contained at page 501 of Pollock's "Law of Torts," 12th edition, that the burden of proof lay initially on the plaintiff to establish that proper precaution had not been taken by the defendant company My reading of the book is that it has not been sufficiently established by authority that the burden of proof would be on the party injured On the other hand, the majority of authority is to the effect that the burden of proof is on the railway company The provision of the Indian Evidence Act, section 106, would also lead to the same conclusion as nobody but the railway company would be in a position to show what was the precaution taken by them In this case the railway administration did take up that burden and adduced evidence in the person of witnesses to show that the engines were fitted with "spark protectors" The lower court has not believed that evidence Two witnesses were examined on the point Ram Lal was one of the engine drivers According to him, his engine was fitted with a spark protector But there does not seem to be any reason why the driver of the other engine was not examined. The guard was not in a position to give any definite evidence and, therefore, his evidence on the point is not useful. Some better authority

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than an engine driver could have been examined by the railway to show that at the date in question the spark protectors were used with all the engines. Ram Lal says that for some time, when he was giving his evidence, the spark protectors had been removed from the engines On the question of fact, therefore, I am not disposed to differ from the court below. I hold, therefore, that the court below was right in finding negligence on the part of the railway company I accordingly dismiss the application with costs.

Application rejected.

REVISIONAL CRIMINAL

Before Mr Justice Boys

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February, 4.

EMPEROR *v.* ISMAIL AND OTHERS *

Act (Local) No I of 1925 [*United Provinces Public Gambling (Amendment) Act*], *section* 2—"*Common gaming house*"—*Criminal Procedure Code, section* 264—*Summary trial*—*Notes of evidence destroyed by magistrate.*

On a question whether a certain house was or was not a "common gaming house" it was *held* (1) that papers which formed the record of "*satta*" transactions were "instruments of gaming"; (2) that it was not necessary to prove that "the bank" was bound to win—the mere expectation of profit was sufficient, and (3) that in a case falling within the first definition of "common gaming house" in the United Provinces Gambling (Amendment) Act, 1925, it was not necessary to show that gambling was carried on "for the profit or gain" of the owner. *Emperor* v. *Atma Ram* (1), followed.

Held also that in cases to which sections 263 and 264 of the Code of Criminal Procedure apply, the magistrate is perfectly free to take such notes as he pleases: the notes that he may take are his private property which he can dispose of as

* Criminal Reference No 735 of 1926.
(1) (1924) I L R, 46 All, 447

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he likes *Emperor* v. *Mantu Tiwari* (1), followed. *Satish Chandra Mitra* v *Manmatha Nath Mitra* (2), dissented from.

THE facts of this case are fully stated in the judgement of the Court

Munshi *Kumuda Prasad*, for the applicant.

The Assistant Government Advocate (Dr. *M Wali-ullah*), for the Crown.

BOYS, J. :—In this case the Magistrate has convicted two persons, Ismail and Ibrahim for keeping a common gaming house, and one Bihari for gaming in that common gaming house The facts found are that a shop and a house belonged to Ismail and Ibrahim jointly, that when the shop was raided "*satta*" papers were found, and when the house was raided advertisements of the "*satta*" gambling were found and accounts of the "*satta*" gambling In the shop was Ismail who was writing on a bit of paper; in the house was Ibrahim. Both men declared that the papers found were waste paper. There can be no doubt on the facts, as found by the Magistrate that they were not waste papers but memoranda of "*satta*" gambling and that the two men, Ismail and Ibrahim, were jointly carrying on the gambling business The learned Sessions Judge has referred this case on several grounds, firstly, on the strength of a Calcutta decision, *Satish Chandra Mitra* v *Manmatha Nath Mitra* (2). He has held that the Magistrate's action in destroying his "notes" of the summary trial was illegal. This is not so according to the view of this Court, though the learned Judge could not be expected to be aware of the ruling which has, so far as I can ascertain, not yet been actually reported It is *Emperor* v. *Mantu Tiwari* (1). There was, therefore, nothing illegal in this case in the Magistrate destroying his notes.

(1) (1926) I L R, 49 All, 261 (2) (1920) I L R, 48 Calc, 280

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Next, the learned Judge has held that the papers found were not instruments of gaming, and he has so held on the authority of the Full Bench case, *Emperor* v *Atma Ram* (1). I do not so read the decision in *Atma Ram's* case The learned Judges held that where "*satta*" gambling was going on, the bits of paper rolled up in a ball on which the figures were written were instruments of gaming At page 453 of the report they say —"It is quite clear that these balls of paper were instruments of gaming." There is no substantial difference between the papers used in that case and the papers found in the house of Ismail in this case. So far, then, the case quoted would support the learned Magistrate's finding. It is clear that in *Atma Ram's* case the Court had no doubt about the question whether such papers were instruments of gaming

Next the learned Judge suggests that it was necessary to establish that the making of profit was certain, and he holds this on the authority also of the same case to which I have already referred, that of *Atma Ram*. The question referred to the Full Bench in that case was as to the interpretation of the words "for the profit or gain of the person," i.e, whether the words "for the profit" necessitated proof that profit was certain to result or whether it was sufficient that the instruments were used in the hope of profit. But that question was not decided by the Full Bench because it found that in the particular case profit was certain to result and therefore, *in any event* the particular case came within the more strict interpretation, *assuming* that interpretation was the correct one. The narrower interpretation was not held to be in fact the correct one. If I had to decide the point I should unhesitatingly hold that it was not necessary to prove that profit was certain to result In my

(1) (1924) I L R, 46 All, 447

opinion a mere expectation of profit would suffice. I further note that such a case as this comes within the first definition of "common gaming house" in the United Provinces Public Gambling (Amendment) Act No I of 1925, in which the phrase "for the profit or gain" does not appear. 1927 EMPEROR v. ISMAIL

In view of what I have said above I see no reason to differentiate between the cases of Ismail and Ibrahim

As regards Bihari the finding of fact is stated by the learned Sessions Judge and I see no reason to interfere with it.

The result is that I decline to accept the reference. The convictions will be maintained and the papers returned.

Reference rejected.

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Sulaiman.

RAM CHARAN SAHU AND ANOTHER (PLAINTIFFS) *v.* MATA PRASAD AND OTHERS (DEFENDANTS) AND MUSAMMAT BAKHTAURA (PLAINTIFF).* 1927 February 7

Act No. IX of 1908 (Indian Limitation Act), schedule I, article 109—Mesne profits—Pendente lite *and future mesne profits claimed but not awarded by decree—Second suit for mesne profits to date of possession—Limitation*—Res judicata—*Civil Procedure Code, section* 11

The period of limitation cannot be suspended, once it has begun to run, unless that suspension is itself provided for in the Indian Limitation Act.

* First Appeal No 1 of 1924, from a decree of Radha Krshen, Subordinate Judge of Basti, dated the 11th of September, 1923.

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Dwijendra Narayan Roy v. *Joges Chandra* (1), *Sarat Kamini Dasi* v. *Nagendra Nath Pal* (2) and *Soni Ram* v. *Kanhaiya Lal* (3), referred to *Bassu Kunwar* v. *Dhum Singh* (4), *Baijnath Sahai* v. *Ramgut Singh* (5), *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri* (6) and *Nrityamoni Dassi* v *Lakhan Chandra Sen* (7), distinguished

Plaintiffs in a suit for possession of immovable property claimed mesne profits previous to the suit, also *pendente lite* and future; but the decree which they ultimately obtained did not include *pendente lite* and future mesne profits Some years later the plaintiffs filed a fresh suit for mesne profits from the date of their previous suit to the date of delivery of possession. *Held* that, although this second suit might not be barred as *res judicata*, the plaintiffs were not entitled to get a decree for mesne profits for more than three years prior to the date of the suit.

Ram Dayal v *Madan Mohan Lal* (8), *Ram Din* v *Bhup Singh* (9), *Doraiswami* v. *Subramania* (10), *Ramasami Iyer* v. *Srirangaraja Iyangar* (11), *Muhammad Ishaq Khan* v. *Muhammad Rustam Ali Khan* (12) and *Atmaram Bhaskar* v *Parashram Ballal* (13), referred to

THE facts of this case were as follows :—

Certain mortgagees brought a suit for sale against the original mortgagor and against one Musammat Sheo Lagna, an ostensible transferee of the property. When impleaded, she stated to the court that she was not the real owner, but that her sons were the real owners and they ought to be impleaded. The mortgagees resisted the attempt to bring the sons of Musammat Sheo Lagna on the record. They obtained a decree against the lady behind the back of her sons. They put to sale the right, title and interest of Musammat

(1) (1923) 39 C L J , 40
(2) (1925) 29 C W N , 973
(3) (1913) I L R , 35 All , 227.
(4) (1888) I L R , 11 All , 47
(5) (1896) I L R , 23 Calc , 775
(6) (1903) I L R , 30 Calc , 1033
(7) (1916) I L R , 43 Calc , 660
(8) (1899) I L R , 21 All , 425
(9) (1908) I L R , 30 All , 225
(10) (1917) I L R , 41 Mad 188.
(11) (1914) 26 Indian Cases, 622
(12) (1919) I L R , 40 All , 202
(13) (1920) I L R , 44 Bom , 954.

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Sheo Lagna, and themselves purchased that right, title and interest at an auction-sale. They then applied for possession, which was formally granted to them in the year 1900. On the strength of this formal delivery of possession they succeeded in ousting the sons, who had not been made parties to the mortgage suit at all. In 1911 the sons instituted a suit to recover possession of the property on the ground that they were the real owners and that they had been wrongfully dispossessed. In addition to the relief for possession the sons claimed not only past mesne profits but also *pendente lite* and future mesne profits. The first court dismissed the suit, but the District Judge remanded it. This case came up in appeal to the High Court and it was finally decided between the parties that the former litigation did not operate as *res judicata* against the plaintiffs and the remand order was upheld; vide *Mata Prasad* v. *Ram Charan Sahu* (1). On the 9th of July, 1915, the trial court decreed the plaintiffs' claim on payment of a certain sum. On appeal the District Judge upheld the conditional decree, but reduced the amount. On the 20th of July, 1920, the High Court in second appeal held that the plaintiffs had been wrongfully dispossessed by the auction-purchasers and were accordingly entitled to an unconditional decree for possession without payment of any amount whatsoever. The learned counsel who appeared for the plaintiffs apparently did not bring to the notice of the High Court that the plaintiffs had in the plaint claimed mesne profits *pendente lite* and future. There was accordingly an omission to make any order as regards mesne profits which had accrued.

The plaintiffs did not apply for a review of judgement and did not take steps to obtain any decree

(1) (1914) 12 A.L.J., 701.

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for mesne profits in their favour. But on the 10th of May, 1922, they instituted the present suit for recovery of mesne profits from the 16th of December, 1911, till the 3rd of September, 1917, namely, from the date of the institution of the previous suit till the date of the delivery of possession of the property to them. This suit was contested by the defendants on the ground that the present claim was barred by the principle of *res judicata* on account of the previous litigation, and that in any case part of the claim was barred by time.

The learned Subordinate Judge, relying on certain rulings of this High Court, held that the present suit was not barred by the principle of *res judicata*. He, however, held that the claim to recover mesne profits for more than three years prior to the present suit was barred by time. The plaintiffs appealed.

Babu *Piari Lal Banerji* and Munshi *Kumuda Prasad*, for the appellants.

Dr. *M. Wali-ullah* and Munshi *Harnandan Prasad*, for the respondents.

THE judgement of the Court (LINDSAY and SULAIMAN, JJ.), after stating the facts as above, thus continued :—

The plaintiffs have come up in appeal and challenge the finding as regards the question of limitation. The learned counsel for the respondents, however, have further urged that the suit is barred by the principle of *res judicata*.

There can be no doubt that under the old Code of Civil Procedure it was held by almost all the High Courts that a subsequent suit for recovery of mesne profits which had accrued since the institution of a

previous suit is not barred by the principle of *res judicata*, even though that amount had been claimed in the former suit. We may mention the Full Bench case of *Ram Dayal* v. *Madan Mohan Lal* (1), which was followed in the case of *Ram Din* v. *Bhup Singh* (2). This view was followed by the Calcutta and the Madras High Courts also.

Under the old Code there was a separate section, section 211, dealing with mesne profits which accrued from the date of the institution of the suit until the delivery of possession. This was separate and distinct from section 212 which dealt with mesne profits prior to the suit In addition to these sections there was a proviso to section 244 in the following words :—

" Nothing in the section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein, where such profits are not dealt with by such decree "

It has also to be noted that under the old Code the mesne profits had to be determined in the execution department which conducted an inquiry after the passing of the decree It was, therefore, held by the Full Bench of this Court in the case of *Ram Dayal* v. *Madan Mohan Lal* (1), that—

"where a suit has been brought for possession of immovable property and for mesne profits both before and after suit, the mere omission of the court to adjudicate upon the claim for future mesne profits will not operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit "

Strong reliance was placed on the word " may" used in section 211 and the proviso to section 244. The view as stated above was accepted by the other High Courts.

(1) (1892) I L.R., 21 All., 425. (2) (1905) I L R. 30 All, 225

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The new Code of Civil Procedure has brought about a substantial change In the first place, mesne profits are not now determined in the execution department, but by the court disposing of the suit Order XX, rule 12, deals with mesne profits both prior to the suit and from the institution of the suit, and provides what decree the court *may* pass when a suit for the recovery of possession of immovable property and for rent or profits is instituted. It would be difficult to hold that the word "may" used in this rule would merely indicate a discretion of the court with reference to clause (*a*) dealing with a decree for the possession of the property Even if the court passes a preliminary decree in the first instance, a final decree in respect of the rent or mesne profits has to be passed after an inquiry has been made.

It is further to be noted that from section 47, which corresponds to the old section 244, the proviso referred to above has been omitted, though, of course, the omission is due mainly to the fact that the mesne profits are no longer to be determined in the execution department.

In spite of the changes introduced in the new Code, two out of the three learned Judges of the Madras High Court, in the case of *Doraiswami* v. *Subramania* (1), held that a fresh suit to recover mesne profits was not barred by section 11. The dissenting Judge adhered to the contrary view expressed by him and another learned Judge in the case of *Ramasami Iyer* v. *Srirangaraja Iyengar* (2) The view of the majority was followed by a Bench of this Court in the case of *Muhammad Ishaq Khan* v. *Muhammad Rustam 'Ali Khan* (3), where it was held

(1) (1917) I L R, 41 Mad, 188 (2) (1914) 26 Indian Cases, 523.
(3) (1915) I L R, 40 All, 292

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that the principle enunciated in the Full Bench case of this Court was applicable even under the new Code and that a subsequent suit for mesne profits *pendente lite* and future could be maintained when the court had on a previous occasion omitted to adjudicate upon such claim. In the opinion of the learned Judges who decided that case the alterations in the new Code were not material so far as this point was concerned.

The Allahabad and the Madras cases, however, have not been followed by the Bombay High Court in the case of *Atmaram Bhaskar* v. *Parashram Ballal* (1)

It is certainly a point for consideration whether, when a relief for *pendente lite* and future mesne profits was specifically claimed in the plaint and it was not granted—intentionally or owing to an oversight—that relief cannot be deemed to have been refused within the meaning of Explanation (5) to section 11 of the Code of Civil Procedure. In this particular case, however, we do not think it necessary to go into this question as the appeal can be disposed of on the other ground raised namely, that of limitation

The claim to recover mesne profits is *primâ facie* governed by article 109 of the Indian Limitation Act, under which the period of three years begins to run from the date when the profits were received The learned advocate for the appellants has to concede that if this article were to be applied, the claim for profits prior to three years before the suit is barred by time. He has, however, tried to meet this difficulty in two ways, firstly by contending that the running of limitation was suspended during the time when the previous litigation was pending or at any

(1) (1920) I L R., 44 Bom., 954.

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rate from the date when the first court passed a conditional decree till the date of the High Court's decree; and, secondly, that the cause of action for the present suit arose after the passing of the High Court's decree.

The first contention is based on certain observations of their Lordships of the Privy Council and certain judgements of the Calcutta High Court. It is urged that independently of the provisions of the Indian Limitation Act there is a general principle of universal application that if circumstances exist which render a suit or an application infructuous, a party should not be compelled to institute it until the impediment in his way is removed or, in other words that where a party in whose favour a cause of action has arisen cannot usefully pursue the remedy at the time, his right of action is postponed to a subsequent date

There are no doubt certain remarks in some of the judgements of their Lordships of the Privy Council going to show that under certain special circumstances "proceedings in the earlier suit stayed the operation of the law of limitation" or that "limitation would without doubt remain in suspense whilst the plaintiffs were *bonâ fide* litigating for their rights in a court of justice." It is also equally true that the Calcutta High Court has applied this principle to some cases which on facts had gone beyond those before their Lordships. Reference may be made to the case of *Dwijendra Narayan Roy* v. *Joges Chandra* (1), and the numerous cases referred to therein, where it was held that under certain circumstances the right to sue could be kept in a state of suspended animation. As the Calcutta cases are not binding upon us, it is not necessary for us to discuss them in detail We may, however, point out that in a more recent case, *Sarat Kamini Dasi* v. *Nagendra Nath Pal* (2), the

Calcutta High Court adopted the view that in applying the principles of limitation the Indian courts are not permitted to travel beyond the provisions embodied in the Indian Limitation Act and that apart from the provisions of that Act there is no principle which can legitimately be invoked to add to or supplement its provisions.

The Indian Limitation Act is undoubtedly an exhaustive Code governing the law of limitation in India The cases in which the running of limitation can be suspended are contained in the sections of the Act. It would be dangerous to lay down generally that there is some principle outside the Indian Limitation Act under which limitation can be suspended. Such a conclusion would be quite contrary to the intention of the legislature Their Lordships of the Privy Council in the case of *Soni Ram* v *Kanhaiya Lal* (1), themselves remarked that there was nothing in the Indian Limitation Act which would justify the Board in holding that once the period of limitation had begun to run it could be suspended Their Lordships considered that if they were to hold that by some reason the period of limitation was suspended, they would be deciding contrary to the express enactment of section 9 that " when once time has begun to run, no subsequent disability or inability to sue stops it " This remark of their Lordships clearly indicates that the period of limitation cannot be suspended once it has begun to run, unless that suspension is itself provided for in the Act We are, therefore, unable to accept any universal principle of suspension of limitation outside the Limitation Act.

It is only at first sight that some of the cases decided by their Lordships of the Privy Council

(1) (1913) I L R , 35 All , 227 (237)

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appear to have been based on some principle outside the statute. When the facts of those cases are carefully examined, it will be found that the decisions are perfectly reconcilable with the Indian Limitation Act. In any case we would be loth to extend any such principle beyond the limits laid down by their Lordships of the Privy Council.

In the case of *Basu Kunwar* v. *Dhum Singh* (1), the decree in the previous suit had brought about a new state of things and imposed a new obligation on Dhum Singh. Their Lordships viewed the matter in either of two ways, namely, according to section 65 of the Indian Contract Act or article 97 of the Indian Limitation Act, according to both of which the plaintiff's claim was not barred by time. On the facts of that case it is impossible to hold that any general principle outside the four corners of the Indian Limitation Act was ever intended to be laid down by their Lordships.

In the case of *Baijnath Sahai* v. *Ramgut Singh* (2), all that their Lordships held was that for the purpose of the law of limitation there was no final, conclusive and definitive order confirming the sale while the question whether the sale should be confirmed was in litigation, or until the order of the commissioner became definitive and operative by the final judgement of the Board of Revenue. In that case their Lordships were considering article 12 of the Indian Limitation Act and trying to ascertain when the sale was confirmed "or would otherwise have become final and conclusive, had no such suit been brought." No question of suspension of time at all arose there.

The case of *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri* (3), was a peculiar case and its

(1) (1888) I.L.R., 11 All., 47. (2) (1896) I.L.R., 23 Calc., 775 (785).
(3) (1903) I.L.R., 30 Calc., 1033.

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facts have to be considered carefully. In 1888 it was established by a decree of the High Court that a certain tenure was of a nature liable in law to an enhancement of rent. In December, 1890, a suit was brought against certain talukdars, claiming to enhance the rent previously paid and to recover rent from the begining of the year 1298F. at an enhanced rent. The Subordinate Judge gave the plaintiff a decree for rent at an enhanced rate, but not to the extent claimed in the plaint and not for the Bengali year 1298F. Another similar suit was subsequently instituted which was tried along with the first suit. There were four appeals from these decrees which were disposed of by the High Court. After the decision of the Subordinate Judge in the previous cases, the plaintiff in November, 1895, filed a fresh suit to recover rent from the defendants at the enhanced rate adjudged by the Subordinate Judge from April, 1891, to October, 1895, thus including in the suit a claim to rent for a portion of the Bengali year 1298F. The Subordinate Judge decreed the claim at the enhanced rate except for the year 1298, holding that that claim having been included in the previous suit of 1890 was barred There were two appeals out of this suit to the High Court which held that the claim for rent for the year 1298 was not barred by *res judicata* but was barred by time. There were consolidated appeals in both the suits to their Lordships of the Privy Council, which were disposed of by one judgement. It is to be noted that the claim for rent in the first suit had been disallowed on the ground that it was premature as the cause of action to recover rent for that period had not accrued on the date when the suit was instituted. This claim was again included in the subsequent suit both of which came

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simultaneously before their Lordships for final disposal. Their Lordships then held that inasmuch as the plaintiff was claiming relief in the former suit which could not be granted, the proceedings in the earlier suit stayed the operation of the law of limitation. It is possible that the disallowance of the relief might be said to be due to a "defect of jurisdiction or other cause of a like nature" which rendered the court unable to entertain it. The period taken up in the former litigation could, therefore, be deducted under section 14 of the Indian Limitation Act. It is, therefore, possible to hold that their Lordships did not mean to do anything more than to apply the provisions of section 14 of the Indian Limitation Act, although they did not expressly say so.

Similarly, the case of *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (1), was an exceptional one. In a previous suit of 1896 certain defendants had associated themselves with the plaintiffs in that action and had asked for an adjudication in those proceedings of their rights. A distinct issue was framed in respect of their claim. The Subordinate Judge actually passed an effective decree in their favour for delivery of possession which was capable of execution. While that decree remained in force they had obtained all that they wanted. So long as that decree stood in their favour it was not open to them to institute a fresh suit for attainment of the very object which had been successfully achieved by them. It was under these peculiar circumstances that their Lordships held that the period during which they were litigating for their rights on the previous occasion should be deducted. This case can be explained on the ground that when an effective decree had been obtained by a party which, if

(1) (1906) I.L.R. 43 Calc. 669

executed, would give him all the relief he can claim, time does not run against him but that he would have a fresh start when that decree is reversed. This case also is, therefore, distinguishable, and the principle underlying it cannot be applied to the converse case where, although the plaintiff was asking for a decree, it was not granted to him owing to his own default.

In the present case the plaintiffs had claimed *pendente lite* and future mesne profits in the former suit, but none of the courts passed a decree in their favour for that relief. They cannot invoke the principle of their Lordships' decision, nor can they urge that they ever obtained a decree which made it infructuous for them to institute a fresh suit.

The second way in which the learned advocate for the plaintiffs tries to meet the difficulty is by saying that the decision of the High Court has given the plaintiff a fresh cause of action. It is contended that so long as the conditional decree passed by the first court remained unreversed the plaintiffs were unable to maintain a claim for mesne profits and that it was only when the High Court held that the plaintiffs were entitled to an unconditional decree for possession that their right to claim mesne profits was established. It is urged that it would have been futile and useless for the plaintiffs to have instituted the suit for mesne profits when they had failed to establish that the defendants were mere trespassers. In support of this reliance is placed on the observations in the two cases decided by the Calcutta High Court referred to above and the case decided by the Madras High Court. To allow such a contention to prevail would be to permit a suit for mesne profits for any number of years, even exceeding 12 years, to

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be instituted subsequently if the title to the property is the subject of a protracted litigation. In such cases the practice certainly is for the plaintiff to institute a suit for mesne profits before the time expires and let it be stayed pending the disposal of the former litigation. Article 109 of the Indian Limitation Act gives the starting point from the date when the profits are received. We cannot make the limitation start instead from the date of an adjudication of the rights between the parties. The plaintiffs' right to recover the mesne profits accrued when the profits to which they were entitled were wrongly received by the defendants If time once began to run and limitation could not be suspended, the decision by the High Court could not give them a fresh cause of action.

It is, however, strongly urged that if the present claim is not barred by the principle of *res judicata*, then inasmuch as this very relief had been asked for in the previous suit, the plaintiffs could not have filed the present suit until the relief asked for in the previous case had been "not granted." Some difficulty is undoubtedly created by conceding that the principle of *res judicata* is inapplicable But all the same we think that there is no inconsistency in holding that while a second suit is not barred by *res judicata* it is barred by limitation. Section 11 of the Code of Civil Procedure and the Indian Limitation Act create distinct and independent bars to the maintenance of a suit, and it may well be that only one bar operates though the other may not. We are, therefore, of opinion that though for the purposes of this appeal we assume that the second suit is not barred by *res judicata*, we nevertheless hold that the period of limitation was never suspended, that no fresh cause of action had accrued and that the claim

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for mesne profits for more than three years prior to the suit was barred by time.

The appeal is accordingly dismissed with costs.

Appeal dismissed

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

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February, 9.

DURGI (DEFENDANT) *v.* KANHAIYA LAL (PLAINTIFF).*

Hindu law—Hindu widow—Will—Widow given an absolute estate by the will of her deceased husband—Subsequent adoption—Adoption subject to provisions of will.

A childless Hindu, the owner of property which had come to him by partition with his adoptive father, made a will leaving everything to his wife. The will provided that "she should be absolute owner of his entire estate, the adopted boy having no power of interference during her lifetime." The widow, in exercise of a power of adoption conferred on her by this will, adopted a son. The deed of adoption stated that the adopted boy "shall be heir to the estate left by my husband and myself." At the date of the adoption the widow was a minor and there were no indications of any intention on her part to divest herself of the estate. *Held*, that the will of the husband prevailed, and the adopted son had no right to possession of the estate so long as his adoptive mother was alive.

Lakshmi v. Subramanya (1), followed and *Vinayak Narayan Jog v. Govindrav Chintaman Jog* (2), *Narayanasami v. Ramasami* (3), *Gopayah Ayyan v. Savithri Ammal* (4), *Visalakshi Amma v. Sivaramien* (5) and *Venkatanarasimha Rao v. Subba Rao* (6), referred to.

THIS was an appeal arising out of a suit by a minor, Kanhaiya Lal, for a declaration that he was the rightful adopted son of Durga Prasad deceased and was the owner of the property described in the

* First Appeal No. 502 of 1925, from a decree of Kashi Nath, Second Additional Subordinate Judge of Cawnpore, dated the 26th of October, 1925.

(1) (1859) I L R., 12 Mad., 490. (2) (1869) 6 Bom. H C R., 224.
(3) (1890) I L R., 14 Mad., 172. (4) (1897) I L R., 21 Mad., 10.
(5) (1904) I L R., 27 Mad., 577. (6) (1922) I L R., 46 Mad., 390.

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schedules attached to the plaint, and that the defendant, Musammat Durgi, the widow of the deceased, had no right or share in the property. The plaintiff's case was that Lala Durga Prasad had under a will, given authority to his wife to adopt a son after his death and in pursuance of that authority the widow adopted the plaintiff in December, 1918, that subsequently the plaintiff was treated as the adopted son by the defendant, but shortly before the suit she denied the factum of adoption and repudiated his status. The contesting defendant, in her written statement, denied the fact of adoption as well as its validity. She further pleaded that under his will, dated the 1st of November, 1917, her deceased husband made her in every way the exclusive owner of the entire property left by him and, even if the plaintiff's adoption were proved, he would have no right to the property as against her The trial court found that the plaintiff was duly adopted by the defendant under the authority given to her by her deceased husband and that there was no legal defect so far as the adoption was concerned It came to the conclusion that, although the defendant had not perhaps attained the age of 18 years, she was about 17 years at the time of adoption and had attained puberty and discretion, and was of age so far as the Hindu law is concerned, and that, therefore, the adoption made by her was perfectly valid and binding It found, however, that the directions given in the will of Durga Prasad were in no way binding on the plaintiff, inasmuch as by virtue of his adoption the plaintiff became entitled to the property and his adoptive father could not have disposed of any part of that property by will. He further found that, even if there was a valid disposition, the defendant had divested herself of all rights in her husband's property on the execution of

the deed of adoption. The Subordinate Judge accordingly decreed the claim in its entirety, with the exception of certain jewels and ornaments that personally belonged to the defendant. The defendant appealed.

Dr. *M. L. Agarwala* and Pandit *Rama Kant Malaviya*, for the appellant.

Sir *Tej Bahadur Sapru*, Dr. *Kailas Nath Katju*, Babu *Saila Nath Mukerji* and Mr. *P. N. Sapru*, for the respondent.

THE judgement of the Court (LINDSAY and SULAIMAN, JJ.), after setting forth the facts as above, thus continued :—

The defendant has come up in appeal and on her behalf some of the findings of the court below are challenged. We may say at the outset that the property in dispute had been acquired by Lala Durga Prasad apparently with the money which he had obtained on partition from his adoptive father. It was assumed by the court below that the property so acquired was the ancestral property of the deceased, and there was no issue framed on the question as to whether it was the self-acquired property of Durga Prasad. The learned Subordinate Judge has distinctly found that the property is ancestral No ground is taken in the memorandum of appeal to the effect that it is not so. We have, therefore, assumed that the property in dispute was the ancestral property of Durga Prasad over which he would have had no power of disposal by a will if a natural born son had been alive in his life time

We may mention that the evidence as regards the factum of adoption is overwhelming and that fact cannot be seriously disputed.

The main point that arises in the case is the one raised on behalf of the defendant, namely, that under

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the will Lala Durga Prasad had created an estate in her favour which is binding on the plaintiff. The learned Subordinate Judge, as stated above, has overruled this contention on the ground of want of power in Durga Prasad to make a bequest and also on the ground that the lady subsequently has surrendered her rights The learned advocate on behalf of the respondent has not tried to support the finding of the court below that there has been a valid surrender of the estate by the widow after her husband's death. As a matter of fact, in view of the finding that she had not even attained the age of 18 years and was in the eye of the law a minor, the alleged surrender by her of her estate cannot be held to be binding on her. Furthermore we are of opinion that the deed of adoption on which reliance is placed does not contain any such words which would justify the inference that she intended to give up any estate which had been given to her by her deceased husband There is in the deed of adoption a reference to the will of her husband that the adoption took place in pursuance of the authority given by it, and this deed of adoption winds up by saying "this adopted boy shall be heir to the estate left by my husband and *myself*" Obviously she was not intending that as soon as the adoption took place she would lose all interest in the property bequeathed to her by her husband On the other hand, she specifically said that the boy would be the heir to the estate left by herself In the absence of any clear and express provision which would imply that she gave up all her rights in the estate we are not prepared to hold that any such surrender was made by her.

The crucial point that remains for consideration is whether Durga Prasad had power to make a bequest of this nature. As some arguments have been

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addressed to us on the actual interpretation of the will and as it has been contended before us that the document does not amount to a will but simply creates an estate in favour of the wife over and above an ordinary Hindu widow's estate, it is necessary to quote a few of the provisions in the will The testator, after saying that during his lifetime he should be the owner of the property, went on to provide that " after his death his widow Musammat Durgi should be the absolute owner of the estate left after defraying his funeral expenses and should have power, like himself, to continue or discontinue the whole business, the shops and the commission agency with the advice and consent of his family, that she should have power to spend the whole of his money with the advice and consent of his family, and that she should have power to make a sale or gift, etc . with the advice and consent of his family " The will then provided that in order to perpetuate the name of the testator, he empowered his wife to adopt with the advice and consent of his family a son of any person she liked, and that, after her death, the adopted boy could become the owner, but the said adopted boy should have no power in the estate left by him in the lifetime of the said " Musammat " The testator then stated that in case he himself adopted a boy during his lifetime, he would make the necessary alterations in the will. The document is called a will by the testator himself We have no doubt in our mind that it was not merely an ordinary Hindu widow's estate that was intended to be conferred on Musammat Durgi. On the other hand, the testator expressly stated that she should be the absolute owner of the entire estate left by him and that she should have power to spend the whole of the money, that is to say, the capital, with the consent of his family and also she should

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have power to make a sale or gift with the consent of his family. Obviously these are not powers which can be ordinarily exercised by a Hindu widow, who has no power to alienate the estate without legal necessity. Then the further provision that during her lifetime the adopted boy should have no power in the estate, was undoubtedly intended to confer on the widow an interest which is not enjoyed by an ordinary Hindu widow. In our opinion the testator had intended to confer on her an absolute estate. with this condition that in case she exercised the power to adopt a boy her interest would be cut down to a life-interest with remainder over to the adopted son This undoubtedly was the intention of the testator Under this will, therefore. a life-estate at least was intended to be created in favour of the widow.

The question then remains whether such an estate was within the competence of Durga Prasad to create?

It is no doubt true that a member of a joint Hindu family has no power to make a bequest of joint family property at a time when he has got a minor son alive It also cannot be disputed that a deed of alienation made by him *inter vivos* before the birth of a son is binding on the son. That there is no power to make a will of joint family property when there are other co-parceners alive is well established by the Full Bench case of this Court—*Lalta Prasad* v. *Sri Mahadeoji Birajman Temple* (1) The learned advocate for the plaintiff has argued that the position of an adopted son is exactly similar to that of a posthumous son, and that his adoption relates back to the death of the father. The contention therefore, is that it must be assumed that the adopted son was a member of the family at the time when the

(1) (1920) I L R., 42 All., 461

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father died and that, therefore, no bequest made by the father, which must of necessity operate from the time of his death, came into effect at the time when the adopted son is deemed to have been in existence It is, therefore, argued that such a bequest is outside the power of the father and is defeated by the right of survivorship. The contention is that on the one hand there is the power of a father to dispose of the property when there is no other member of the joint family alive, on the other hand, there is the right of an adopted son to claim the joint property by survivorship. It is said that when the bequest comes into conflict with the right of survivorship the latter prevails and the bequest is null and void In our opinion this argument must proceed on the assumption that an adopted son is deemed to be alive before the father dies, so that he becomes a member of the joint Hindu family with his father and on his death, succeeds to the estate by right of survivorship We think it is impossible to extend the fiction of his previous existence to such a degree Great reliance is placed on the remarks of their Lordships of the Privy Council in the case of *Pratapsingh Shivsingh* v *Agarsingji Rajasangji* (1), that—

"an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that adoption, so far as the continuity of the line is concerned, has a retrospective effect; whenever the adoption may be made there is no hiatus in the continuity of the line"

That was a case where it was held that no reversion to the original grantor could take place when a son was actually adopted, inasmuch as there was no break in the continuity of the line. But to say that there is no break in the continuity of the line is one thing and so say that the adopted son must be deemed to be a member of the joint Hindu family with the

(1) (1918) I L R, 43 Bom, 778

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deceased father, so as to acquire the property by right of survivorship, is quite another This latter view has not been accepted in a number of cases by the Madras High Court which has allowed a disposition by the father to be upheld as against the claim of a subsequently adopted son. In the case of *Lakshmi* v. *Subramanya* (1), adoption had taken place subject to a will which had been made by the adoptive father with the consent of the natural father of the son The Madras High Court, following an earlier case of the Bombay High Court, *Vinayak Narayan Jog* v *Govindrao Chintaman Jog* (2), held that such an arrangement was binding on the adopted son Similarly, in the case of *Narayanasami* v *Ramasami* (3), there was a will by the adoptive father before the adoption The adoption took place by the father before his death and the natural father consented to the disposition under the will It was held that the adopted son was bound by that bequest Again, in the case of *Ganapati Ayyan* v. *Savithri Ammal* (4), there was a will with a power to the wife to adopt and after the death of the father there was an adoption with full knowledge of the existence of the will It was held by the learned Judges of the Madras High Court that the adopted boy could not repudiate the bequest SUBRAMANIA AYYAR, J., in repelling the contention on behalf of the adopted son, pointed out that—

"Even if it be supposed that the rights of the adopted son to challenge a disposition of his father arise from the time of his father's death, his case cannot possibly be put on a higher footing than if he had been adopted at the moment of the adoptive father's death Even in that case the direction as to the allotment of the property to the charity was an oral devise which became operative the moment the testator died and, as *ex hypothesi*, the adopted son's title to his

(1) (1889) I L R, 12 Mad, 490
(2) (1869) 6 Bom H C R, 224
(3) (1899) I L R, 14 Mad, 172
(4) (1897) I L R, 21 Mad, 10

adoptive father's estate accrued then and not earlier, it is difficult to see how on principle the defendant could be entitled to question the alienation. For, unlike the case where the adoption takes place before the will comes into force, the adopted son's right, according to the supposition comes into existence simultaneously with the right of the charity. How then can the former derogate from the latter right?"

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The learned Judge adhered to the same view in his order of reference in the case of *Visalakshi Ammal* v. *Sivaramien* (1). We quote the following passage from that order:—

"In cases of adoption after the death of the adoptive father by his widow under his authority, every lawful disposition of his property made by him, even by a will, would be binding on the adopted son, for the obvious reason that those dispositions became operative from the moment of the death of the testator, while the adoption must necessarily take place at some time subsequent to the death, and the rights accruing by virtue of such adoption are only in that part of the estate which remains undisposed of at the moment of the adoption."

In our opinion this is a correct statement of the true position. It cannot be said that the rights of the adopted son came into force before the death of the father. If it is not so, then he can only succeed to the estate which remains at the time of the father's death. If during his life time the father had made a bequest which came into effect as soon as he died, it is obvious that his son can only take the estate subject to the bequest. This view has been followed subsequently by the Madras High Court in the case of *Venkatanarasimha Rao* v. *Subba Rao* (2). The learned Judges in that case, while upholding the provisions of a will, remarked—

(1) (1904) I L R, 27 Mad., 577 (2) (1922) I L R, 46 Mad., 300

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"The adopted son could not, while approbating the provision of the will under which his adoption was made, reprobate other provisions of the same will and repudiate the bequest to charity."

It is, however, pointed out by the learned counsel for the respondent that the adopted son is not necessarily approbating the will, for he derives his title from the fact of his adoption and not under the will and that the authority to adopt could have been given orally and independently of the will.

The case before us is very similar, even on facts, to that before the Calcutta High Court—*Harendra Nath Avasti* v. *Shibo Sundari Debi Chowdhurani* (1). The parties in that case were governed by the Mitakshara law and the father, who was the sole member of his family, made a will under which he gave authority to his wife to adopt a son after his death and provided that she should have a right to remain in possession of the entire estate for her life and that the adopted son would have no right of interference during her lifetime. Some years after the death of the father the widow adopted a boy as her son. The learned Judges of the Calcutta High Court held that the provisions of the will from which the authority to adopt was derived, should be upheld when the natural father admitted and accepted the validity of those provisions. They relied on the authority of the Madras case referred to above and also on some cases of the Bombay High Court. In fact some of the cases have gone further and laid down that when a Hindu makes a disposition of his property even by a will, as part of the same transaction as adoption, which is well known to the natural father, such disposition is good against the son. *A fortiori* adoption after the death of the father, when his disposition has come into effect, must be subject

(1) (1908) 3 Indian Cases, 378

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to such disposition Another case which came up before the Calcutta High Court. *Surendra Nath Ghose* v. *Kala Chand Banerjee* (1), was, however, a case under the Day bhaga law under which different considerations arise.

The learned advocate for the respondent has relied strongly on two cases of their Lordships of the Privy Council, *Nagindas Bhagwandas* v. *Bachoo Hurkissondas* (2) and *Pratapsingh Shivsingh* v. *Agarsingji Rajasangji* (3), as well as the Full Bench case of *Visalakshi Ammal* v. *Sivaramien* (4), and an earlier case of the Privy Council, *Bhasba Rabidat Singh* v *Indar Kunwar* (5) We have already referred to the Privy Council case in I. L. R., 43 Bom. 778. As to the earlier case reported in I. L. R., 40 Bom., 270, we find that there the main question was one of competition between an adopted son and a subsequently born natural son of the same family, and the question was "whether the rights of an adopted son are to be cut down only when he is the son of the same father as the natural born son or whether they are also to be cut down when they belong to the same family" It was held by their Lordships that the adopted son was entitled to an equal share with the natural born son of another brother. We do not think that that case has in any way decided the point which arises before us in the present case

The case of *Bhasba Rabidat Singh* v. *Indar Kunwar* (5), is also different inasmuch as there the widow had entered into a contract with the natural father of the boy for retaining possession of the entire estate during her life time. The only question that came up for consideration was as regards the validity of the adoption itself and not that of the agreement. Their

(1) (1907) 12 C W N., 663
(2) (1915) I L R., 40 Bom., 270
(3) (1918) I L R 43 Bom., 778
(4) (1904) I L R., 27 Mad., 577.
(5) (1888) I L R., 16 Calc., 556

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Lordships, however, did remark that it was possible that such an agreement was void. We think that there is no analogy between a case where a Hindu widow tries to secure an unfair advantage before the exercise of her power to adopt and the case where the father who has the full disposing power in his life time, makes provisions intending that they should be binding on the son when adopted in future The case of *Visalakshi Ammal* v *Sivaramien* (1), is similarly distinguishable on the ground that there an agreement was entered into between the widow and the natural father at the time of the adoption, and it was held that the agreement, if fair and reasonable, would be binding on the adopted son. This case has, in our opinion, no bearing on the case before us

Although it is true that in certain respects the adoption relates back to the death of the father, it is equally true that it is not so in all respects It is well known that an alienation made by a Hindu widow for legal necessity after the death of her husband and before the adoption cannot be ignored by the adopted son merely on the ground that by virtue of his adoption he must be deemed to have been in existence at the time when his father died and that, therefore, his adoptive mother had no power to alienate his property Similarly, in cases where succession to a collateral opened before the adoption took place, the adopted son cannot get back the property from the heir in whom it has become vested on the ground of his supposed existence at the time when his father died There are also cases where bequests in favour of various persons had come into effect long before the adoption. In all such cases it is very difficult to extend the fiction of his existence at the time of his father's death It is thus obvious that such a supposition cannot be made

(1) (1904) I L R , 27 Mad , 577

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in all cases and there is no such rule of universal application. So far as the point before us is concerned the great preponderance of authority is in favour of upholding the power of the father to make provisions which would be binding on his subsequently adopted son. We, therefore, think that the view taken by the learned Subordinate Judge that the disposition made by Durga Prasad was null and void and in no way binding on the plaintiff was not correct.

We accordingly allow this appeal, and setting aside the decree of the court below, grant the plaintiff a declaration that he is the validly adopted son of Durga Prasad but that the estate created under the will, dated the 1st of November, 1917, in favour of Musammat Durgi holds good and the plaintiff will have no right to obtain possession of the estate of the deceased during her life time. The plaintiff's claim for possession is, therefore, dismissed. The defendant's claim that all the articles mentioned in list No. 2 of the plaint are her *stridhan* has not been made out. They will be treated as part of the estate left by the deceased with the exception of the personal ornaments, wearing apparel and clothes mentioned in the concluding portion of the lower court's judgement. In view of the fact that the defendant denied even the factum of adoption we are of opinion that the parties should bear their own costs in both courts.

Appeal allowed.

Before Mr Justice Lindsay and Mr. Justice Sulaiman

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CHANDRA SHEKHAR AND ANOTHER (OPPOSITE PARTIES) *v.* AMIR BEGAM (APPLICANT) AND MUHAMMAD ALI KHAN AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, section 11; *order IX, rule* 3, *order XXXIV, rule* 5—*Application for final decree in a mortgage suit dismissed without fixing date for hearing of suit—Fresh application filed within time*—Res judicata.

Six months' time was fixed for payment in two suits for sale on mortgages in which the preliminary decrees were affirmed by the High Court in May, 1921 On the 7th of August, 1923, two applications for final decrees were made, and, as these did not contain a complete list of the mortgaged property and the interest shown was wrongly calculated, time was twice allowed to the decree-holders to cure the defect, and, ultimately, the applications were dismissed on the 15th of September, 1923, in the absence of the applicants and their counsel Subsequently, within thirty days of this dismissal, the decree-holders filed fresh applications for final decrees without referring to the previous dismissal. The judgement-debtors' objections, that these applications were barred by limitation, were disallowed by the Subordinate Judge who eventually ordered preparation of the final decrees *Held*, on appeal: that the applications were not barred, either by the rule of *res judicata* or by reason of order IX. rule 3, of the Code of Civil Procedure.

Lachmi Narain Marwari v *Balmakund Marwari* (1), followed. *Ahmad Khan* v. *Gaura* (2), referred to

Further, that under order XXXIV, rule 5, it was not incumbent on the decree-holders to furnish a fresh list of the mortgaged property and their applications could not be dismissed on the ground that the interest was wrongly calculated. *Jodha Singh* v. *Gokaran Das Pande* (3), followed

THE facts of this case are fully stated in the judgement of the Court.

* First Appeals Nos 130 and 131 of 1924, from a decree of Abdul Halim, Additional Subordinate Judge of Meerut, dated the 22nd of December, 1923

(1) (1924) I L.R., 4 Pat., 61 (2) (1917) 16 A L J., 148
(3) (1925) I L R., 47 All., 546

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CHANDWA SHEEBAB v. AMIR BEGAM

Sir *Tej Bahadur Sapru* and Dr. *N. C. Vaish*, for the appellants

Dr. *M. L. Agarwala*, Mr. *Muhammad Husain* and Mr. *Akhtar Husain Khan*, for the respondents.

LINDSAY and SULAIMAN, JJ.:—First Appeal No. 130 and First Appeal No. 131 of 1924 are connected and raise the same question of law. Both are appeals from final decrees in two suits for sale on mortgages in which the preliminary decrees were affirmed by the High Court in May, 1921. Six months' time was fixed for payment in both cases. On the 7th of August, 1923, two applications for the preparation of final decrees in the two cases were made The office, however, reported that the applications did not contain a complete list of the mortgaged property and that the calculation of the amount of interest due appeared to be wrong Time was twice allowed to the decree-holders to cure this defect; ultimately the application was dismissed on the 5th of September, 1923, in the absence of the applicants and their counsel. Subsequently within thirty days of this dismissal the decree-holders filed fresh applications for the preparation of final decrees. In these applications they did not refer to the previous dismissal and these applications did not in express language purport to be applications for setting aside the former dismissal but were fresh applications for the preparation of final decrees. On notice being issued to the judgement-debtors, objections were filed on their behalf to the effect that these applications were barred by time and that they were not maintainable. The learned Subordinate Judge has disallowed these objections and ordered that the final decrees be prepared Hence these appeals.

The plea of limitation has not been pressed before us and we are unable to see how it could be

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seriously urged when the present applications were within three years of the High Court's decree and within thirty days of the previous dismissal.

The learned Subordinate Judge in his order has thought that the previous dismissal was for default of appearance on behalf of the parties If he meant thereby that both the decree-holders and the judgement- debtors were absent, then he was not quite accurate for, as we have pointed out above, the applications were dismissed for want of compliance with the office report and before any notice had been issued to the judgement-debtors. No date had been fixed for the appearance of the judgement-debtors and they had in fact not been summoned to appear at all. The dismissal was, in fact. due only to the default of appearance of the decree-holders and their counsel

It is obvious that in a case of this kind the principle of constructive *res judicata* cannot apply, because the matter was never adjudicated upon between the parties, the judgement-debtors not having been summoned and the applications not having been dismissed on merits

The learned advocate for the appellants, however, contends that the second application was not maintainable in view of the provisions of order IX of the Code of Civil Procedure His contention is that under the new Code a mortgage suit continues to be pending till it is completely disposed of by the preparation of a final decree and that whenever an application for a final decree is dismissed for any reason whatsoever, the suit itself is dismissed, and the remedy of the plaintiff is either to bring a fresh suit or to apply for the setting aside of that dismissal

If we were to assume that order IX, rule 3, was applicable to these cases and that the provisions of

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that rule (which in express language apply to suits only) applied to these cases, then we would have to hold that the word "application" should be substituted for the word "suit" in rule 3, and similarly in rule 4, which would entitle the decree-holders to make a fresh application This was the view expressed by a Bench of this Court in the case of *Ahmad Khan* v *Gaura* (1)

We, however, think that the provisions of order IX, rule 3, are not at all applicable to the facts of these cases. Rule 1 of the order contemplates proceedings following upon the fixing of a date for the appearance of the defendant Rule 3 expressly states that where neither party appears when the suit is called on for hearing, the court may make an order that the suit be dismissed It is, therefore, apparent that unless a date has been fixed for the appearance of the defendant and neither party appears when the suit is called on for hearing on that date, rule 3 would not apply. In the present case the application was dismissed without any date having been fixed and the judgement-debtors could not be expected to appear nor could the "suit" be said to have been called on for hearing

Further, in view of the pronouncement of their Lordships of the Privy Council in the case of *Lachmi Narain Marwari* v *Balmakund Marwari* (2), we are bound to hold that the provisions of the said rule are not applicable to a case where a preliminary decree has already been passed In the case aforementioned a preliminary decree for partition had been passed and the case had gone back to the trial court for the completion of the partition The application for final decree was dismissed after several adjournments, and yet their Lordships held that the analogous provisions of order XVII, rule 2, were not applicable when a preliminary decree had been passed and

(1) (1917) 56 A L J , 143 (2) (1924) I L R , 4 Pat , 61

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the whole suit could not be dismissed. Their Lordships referred to order IX, rule 3, also and pointed out that after a decree had once been made in a suit the suit could not be dismissed unless that decree was reversed or varied on appeal. The parties, on the making of the decree, acquired rights or incurred liabilities which were fixed and they were entitled to apply to have it enforced.

Similarly, rule 8 cannot apply becaue the defendants did not appear

We might add that the present applications were made within thirty days of the dismissal of the previous applications, and although they do not expressly purport to be applications for setting aside the dismissal they could be treated as such if necessary We have already remarked that in our opinion it is open to the decree-holders to make fresh applications so long as limitation has not expired and the applications are not barred by the principle of *res judicata* We may also point out that the report of the office was based on a misconception, inasmuch as under order XXXIV, rule 5, it was not incumbent on the mortgagee decree-holder to furnish a fresh list of the mortgaged property nor could the applications be dismissed on the mere ground that the amount of interest calculated was wrong The court could, in order to correct its own mistake, revoke the order of dismissal and pass a final decree upon application made by the decree-holder even though such application, regarded as a fresh application in execution or as an application for review, was beyond time *Jodha Singh* v. *Gokaran Das Pande* (1) Looked at from any point of view, these applications were competent. The appeals are accordingly dismissed with costs in both courts.

Appeal dismissed

(1) (1925) I L R, 47 All, 646

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Before Justice Sir Cecil Walsh and Mr Justice Banerji

GOSWAMI GORDHAN LALJI MAHARAJ (DEFENDANT) *v.* BISHAMBAR NATH (PLAINTIFF).*

Civil Procedure Code, order II, rule 2—Mesne profits—Future mesne profits not claimed in original suit—Subsequent suit therefor barred

A court being competent to give a decree for future mesne profits to the date of obtaining possession, if a plaintiff omits to ask for them in his plaint, a subsequent suit for the same relief will be barred by order II, rule 2, of the Code of Civil Procedure. *Ram Din* v *Bhup Singh* (1), *Kashi* v *Bajrang Prasad* (2) and *Girwar Singh* v. *Ram Piari Kuer* (3), followed.

THE facts of this case were as follows:— On the 11th of May, 1921, the plaintiff brought a suit against the defendant for recovery of possession of certain property The suit was decreed and in execution of the decree the plaintiff obtained possession on the 3rd of May, 1925. Then the plaintiff brought a second suit against the same defendant on the 24th of August, 1925, for recovery of Rs. 294 as mesne profits for a period of two years and eight months preceding this suit,—from August 1922, up to the 3rd of May, 1925, the date of delivery of possession The defendant pleaded, *inter alia*, that the suit was barred by order II, rule 2, of the Code of Civil Procedure The court of first instance held that the suit was so barred: the lower appellate court upset this decision and remanded the suit for ascertainment of the amount of the mesne profits The defendant appealed from this order of remand.

Munshi *Narain Prasad Asthana*, for the appellant.

* First Appeal No 113 of 1926, from an order of Kashi Prasad, Subordinate Judge of Muttra, dated the 11th of May, 1926

(1) (1908) I L R, 30 All, 225 (2) (1907) I L R, 30 All. 36
(3) (1924) 78 Indian Cases, 326

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GOSWAMI GORDHAN LALJI MAHARAJ v. BISHAMBAR NATH

The respondent was not represented

WALSH and BANERJI, JJ. —We must allow this appeal. There is a great deal to be said for the Judge's view, in fact we should have been disposed to take the same view ourselves if we had been free to do so We agree with the learned Judge that order II, rule 2, looks as though it was directory and not mandatory, and that the plaintiff is not prejudiced if the court does not choose to make its decree include post-decretal damages or mesne profits It undoubtedly can do so, and there is a good deal to be said for the view that mesne profits, which only arise after the suit in case the defendant fails to give up possession, cannot be regarded as part of the plaintiff's claim when a suit is instituted But, on the other hand, nobody can doubt that the plaintiff can claim and the court can award mesne profits up to the date of obtaining possession, that is to say, a contingent liability if the defendant should continue to retain possession On the whole we think that the cases are too strong and that we must follow the accepted practice in this Court. The learned Judge has undoubtedly quoted a case which has nothing to do with it and has not referred to those which do. There is a two-Judge case, *Ram Din* v. *Bhup Singh* (1), which was a suit for redemption of a usufructuary mortgage That is a distinct decision on order II, rule 2 Mr Justice RICHARDS decided the same thing in a mortgage suit in *Kashi* v. *Bajrang Prasad* (2). He did not refer to order II, rule 2, which was then section 43, but took a sort of general view, and said that in a suit for redemption there ought to be a complete and final statement of all accounts right up to the time of actual redemption or sale Mr. Justice STUART in a more recent case (3),

(1) (1908) I L R , 30 All , 225 (2) (1907) I L R , 30 All , 36
(3) *Gurwar Singh* v *Ram Piari Kuer* (1924), 78 Indian Cases 326

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has applied order II rule 2, to mesne profits between the date of the decree and the date of possession, relying on the authority of the two cases we have just quoted, and he held that the failure of the plaintiff to make a claim in the suit for mesne profits up to the date of possession prevents his putting it forward in a separate suit. We think it hard. It is entirely the result of loose pleading probably due to ignorance of the true methods and objects of pleading. Whether it can be described as negligence is rather doubtful when one recognizes how low the standard of pleading is in the inferior courts and the absence of any scientific training in the art. But, on the whole, we are not prepared to depart from the practice which appears to be established by the cases we have referred to. One day, perhaps, somebody who takes sufficient interest in the question may induce some Bench to appoint a larger Bench to consider these decisions, but we are not prepared to do so today. We must, therefore, allow the appeal and restore the order of the first court with costs in the two courts.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr Justice Dalal

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February, 15.

JUGAL KISHORE (PLAINTIFF) *v.* CHARI AND COMPANY AND ANOTHER (DEFENDANTS) *

Act No. IX of 1872 (Indian Contract Act), section 63—Undertaking by creditor not to take steps to recover debt within a time named—Consideration—Civil Procedure Code, order VI, rule 17—Amendment of plaint.

Held, on a construction of section 63 of the Indian Contract Act, that an undertaking given by a creditor to his debtor not to take steps to recover his debt before the expiry of a certain period is binding on the creditor and a suit

* First Appeal No 159 of 1924, from a decree of Shamsuddin Khan, Subordinate Judge of Jhansi, dated the 17th of December, 1923

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brought before the expiry of the period named must be dismissed as premature. *Davis* v *Cundasami Mudali* (1) and *N. M. Firm* v. *Thoperumal Chetty* (2), followed.

THE facts of this case are fully stated in the judgement of the Court.

Dr. *Surendra Nath Sen* and Munshi *Haribans Sahai*, for the appellant

The respondents were not represented.

MEARS, C J., and DALAL, J. :—Lala Jugal Kishore, son of Lala Har Chand Rai, was the original proprietor of a firm, Bundelkhand Cycle and Motor Agency, at Jhansi, and Messrs. Chari & Co., Limited, is a firm carrying on business in Calcutta. Mr. Naidu was the manager in charge at Lalitpur.

The case made by the plaintiffs was that they had delivered goods to the first defendant through the agent of the first defendant, Mr. Naidu, of a total value of Rs. 12,731-12-0 A written statement was filed challenging the liability of the defendants, especially in relation to a large item of Rs. 11,336, alleging that the receipt relied upon by the plaintiffs was a forgery inasmuch as the figure "1" had been added in front of the " 1,000," changing thereby the apparent liability from Rs. 1,336 to Rs. 11,336. After a great deal of delay there came a moment when the vakil for Mr. Naidu put forward to the court a letter signed by Sant Lal, dated the 15th of August, 1922. Now the 15th of August, 1922, was the date on which Mr Naidu had acknowledged the receipt of goods of the value of Rs. 145 and Rs. 1,336 and, according to the plaintiffs the receipt of goods of the value of Rs. 145 and Rs 11,336, and on this 15th of August, 1922, in the absence of any agreement to the contrary, the law would presume that delivery and payment were concurrent conditions. and as regards the two items of

(1) (1896) I.L.R. 19 Mad., 398 (2) (1921) I.L.R., 45 Mad., 180

the 15th of August, 1922, they became due and payable on that date, whilst other items were due and payable some months previously. In that condition of affairs Sant Lal, who was accepted by the Judge as the son of the plaintiff, Lala Jugal Kishore, and his duly authorized agent, wrote the following letter (presumably it is addressed to Mr. Naidu, but in the text given at page 10 no addressee is given):—

"DEAR SIR,—

Your account up to date either against you or your company shall be recovered by me after two months from this date and, in the meantime, I shall not compel you for payment."

That is a letter written by a man not very well versed in the English language, and we must, therefore, try to ascertain for ourselves whether we agree with the construction which has been put upon it by the Subordinate Judge. He regards it as a promise or an undertaking by the plaintiffs through their agent Sant Lal to give Naidu or the company or both two months' credit from the 15th of August, 1922, and we think that that was the meaning of the letter. The phrase "and in the meantime I shall not compel you for payment" must mean that whilst the two months were running I shall not compel you to pay. In the same way "your account shall be recovered by me after two months" means that Mr. Naidu and the company are to have two months' credit before any steps are taken to recover the money. We, therefore, agree with the learned Subordinate Judge on the construction put on the document, and inasmuch as the suit was commenced on the 26th of August, a point was raised that the suit was premature and it is on that ground that the learned Judge has dismissed the action altogether. We are of opinion that the learned Judge is right and the only point that can be

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urged, apart from the proper construction of the letter on which we have already expressed our opinion, is that the letter is not supported by any consideration, and that, therefore, it was a mere *nudum pactum* or a promise which the plaintiff firm were at liberty to disregard immediately after it was given or at any moment during the currency of the two months if it seemed convenient to them to do so. We are of opinion that section 63 of the Indian Contract Act was drafted with the definite object of making an alteration in the law from that which prevailed in England in regard to the doctrine of consideration. In our opinion section 63 does enable a defendant, who has got such a letter in his hands, to plead that although the letter is not supported by any consideration, it is nevertheless a binding extension of time and prevents any action being taken within the period of credit given. There are two cases, one of *Davis* v. *Cundasami Mudali* (1), which is an authority directly and clearly in point, and another Madras case of *N M. Firm* v. *Theperumal Chetty* (2). Mr. Justice ODGERS, while discussing section 63, refers to the authority of other cases and says that there is authority for saying that section 63 "not only modifies but is in direct antagonism to the law in England" We are satisfied that in a case of this character section 63 can be relied upon and that the learned Subordinate Judge came to a proper decision when he dismissed the suit as premature. Although it is not a necessary part of our decision, we cannot help remarking that it is strange that the plaintiff should not have preferred to have commenced another suit immediately upon the dismissal of this action in December, 1923, at which date the defence of the premature suit could not have been taken It has been pressed before us that this

(1) (1896) I.L.R., 19 Mad., 398 (2) (1921) I.L.R., 45 Mad., 180

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was a proper case for an amendment either by the Subordinate Judge himself or by this Court, but we have pointed out that there can be no amendment in a case of this kind, where the whole foundation is sought to be destroyed by the allegation that the action itself is premature. If the action is found to be premature, amendment cannot cure a defect of that character.

The result is that this appeal must be dismissed. The defendants do not appear. The appeal is, therefore, dismissed without costs.

Appeal dismissed.

Before Justice Sir Cecil Walsh and Mr Justice Banerji.

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February, 15.

RAM RATAN LAL (DEFENDANT) *v* ABDUL WAHID KHAN (PLAINTIFF) *

Act No IX of 1908 (Indian Limitation Act), schedule I, article 83—Limitation—Agreement to pay money to a third party—Cause of action—Terminus a quo

If *A* undertakes to pay money to *C* on behalf of *B*, but no time is specified within which the payment is to be made, no cause of action arises against *A* until payment is demanded by either *B* or *C*. If then—*A* having made default in payment—*C* sues *B* and recovers from him, limitation in respect of a suit by *B* against *A* will not begin to run until *B* has been compelled by *C* to pay. *Kedar Nath* v. *Har Govind* (1), followed. *Raghubar Rai* v *Jai Raj* (2), referred to.

THE facts of this case were, briefly, as follows:—Jafri Begam mortgaged certain property to Yusuf Ali in 1902. Abdul Wahid, the heir of Jafri Begam, sold a portion of this property on the 22nd of June, 1907, to Ram Ratan, and out of the sale price he left with Ram Ratan a sum sufficient to pay off the whole of the amount due on the mortgage and directed him

* First Appeal No. 134 of 1926, from an order of Raghunath Prasad, District Judge of Farrukhabad, dated the 9th of June, 1926.

(1) (1926) 24 A.L.J., 880. (2) (1912) I.L.R., 34 All., 429.

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to do so Ram Ratan did not pay the money to Yusuf Ali. On the 11th of October 1915. Yusuf Ali brought a suit on his mortgage against Abdul Wahid and Ram Ratan. The suit was decreed and, in accordance with the decree, the portion of the property which had been purchased by Ram Ratan was sold first. The proceeds proving insufficient, Yusuf Ali, in August, 1918, applied for sale of the portion of the property left with Abdul Wahid. Upon this a compromise was effected between Yusuf Ali and Abdul Wahid on the 18th of June, 1920, by which Abdul Wahid had to pay Rs. 2,500 to Yusuf Ali and the sale was averted. Within three years of the date of this payment Abdul Wahid filed a suit against Ram Ratan for recovery of Rs. 2,500. The court of first instance deemed the character of the suit as being one for the recovery of purchase-money and held it to be barred by limitation. The lower appellate court regarded the suit as being one for damages actually occasioned to the plaintiff by the failure of the defendant to pay off the money that was left with him for payment to Yusuf Ali, and holding that the suit was within time, remanded the suit for disposal on the merits. The defendant appealed to the High Court

Munshi *Narain Prasad Asthana* and Munshi *Girdhari Lal Agarwala*, for the appellant.

Maulvi *Mukhtar Ahmad*, for the respondent.

WALSH and BANERJI, JJ —We think that this appeal fails. We agree with the view taken by the learned Judge. There seems to have been a good deal of discussion at different times about the date of the cause of action and, therefore, the plea of limitation for these suits for loss or damage incurred by reason of the failure of a party to the contract to carry out his undertaking to pay money to a third person. From one point of view the present appeal is unarguable.

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Mr. *Narain Prasad Asthana* says that no time was fixed for payment, therefore no time ever arose for the performance of the obligation, therefore there could be no breach until the person who had undertaken to pay was called upon to do so, either by the person with whom he had consented to pay, or by the person whom he ought to have paid. It would be sufficient intimation creating a breach when the person to whom the money has to be paid sues the original debtors, namely, in this case, the plaintiff. We hold unhesitatingly that where no time is mentioned, it means the undertaking is an undertaking to pay upon demand and no cause of action arises until demand is made, and when demand is made and ignored, then if the person to whom the money should be paid sues the person with whom the contract has been made, loss occurs and damages are recovered, the cause of action is not the breach, but the loss itself, and, therefore, the statute in this case ran from the time when the money was paid. Reliance was placed upon a decision, which is now of some years' standing, reported in *Raghubar Rai* v *Jaiji Raj* (1) We doubt whether that case is a clear authority The money in that case had not been paid and, therefore, the question which has arisen in most of the subsequent cases did not arise There seems to be a healthy and consistent current of authority in recent years that the statute runs from the time when the loss is incurred, or, in other words, when payment is made. The learned Judge based himself upon a recent case decided by a Bench of this Court in *Kedar Nath* v. *Har Govind* (2). We agree with that decision We think that it is applicable here and we think that in all probability the reasoning of Mr. Justice ASHWORTH'S judgement drawing attention to the difference between

(1) (1912) I L R , 34 All., 429. (2) (1926) 24 A L J , 550.

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the law of contract in England and as codified in India, is possibly the explanation or the foundation of the consistent rule which has been laid down by this Court. The appeal must be dismissed with costs

Appeal dismissed

Before Mr. Justice Ashworth and Mr Justice Iqbal Ahmad.

1927 *February*, 18

AMAR SINGH AND ANOTHER (DEFENDANTS) *v.* GOBIND RAM AND ANOTHER (PLAINTIFFS) AND SUNDAR LAL (DEFENDANT) *

Act (Local) No II of 1901 *(Agra Tenancy Act), section* 199 (3)—*Act (Local) No III of* 1901 *(Land Revenue Act), section* 111, *clause* (1)—Res judicata—*Decree of revenue court—Conflicting decisions—Later prevails*

A decision of a revenue court, under section 199(3) of the Agra Tenancy Act, operates as a decision by a civil court for the purpose of *res judicata Thakur Hanwant Singh* v. *Jhamola Kunwar* (1) and *Baru Mal* v *Sunder Lal* (2), followed

In a case where two decrees operate as *res judicata*, one as against the plaintiff and the other as against the defendant, the later decree must prevail over the former because it shuts out consideration of the former. *Dambar Singh* v. *Munawwar Ali Khan* (3), followed

THE facts of this case are fully stated in the judgement of the Court.

Babu *Saila Nath Mukerji*, for the appellants.

Munshi *Narain Prasad Ashthana*, for the respondents.

ASHWORTH and IQBAL AHMAD, JJ. :—This second appeal by the defendants arises out of a suit brought by the plaintiffs respondents for a declaration of their

* Second Appeal No 1360 of 1925, from a decree of Kashi Prasad, Subordinate Judge of Muttra, dated the 5th of October, 1925, reversing a decree of Ram Saran Das, Munsif of Mahaban, dated the 14th of July, 1925.

(1) (1922) 20 A L J , 840 (2) (1923) 21 A L J , 330.
(3) (1915) I L R , 37 All , 531.

proprietary title in respect of 9·33 acres of land out of 50 acres in a certain *khata*. The plaintiffs based their title on the fact that previous to the year 1900 they were zamindars and had a share in two other *khatas* and also a corresponding share in this particular *khata*, which was a *shamlat khata*. They admitted that the defendants had purchased a fraction of their rights in the other *khatas*, but maintained that at the auction-sale there was no mention of a purchase of land or share in the *shamlat khata*. They also maintained that the defendants in 1914 had sued them as the lambardars for a share of profits in the *shamlat khata* in dispute and that in that case the revenue court had decided against the defendants and that this decision of the revenue court operated as *res judicata* in the present case. A third reason for their claim being allowed was that they had been in adverse possession of the land in suit for twelve years as against the defendants, if the latter could be held to have acquired any title by the auction-sale of 1900.

The trial court, namely the Munsif of Mahaban, decided (1) that the defendants had acquired a title in the *shamlat patti* by reason of their purchase of an interest in the principal *khatas;* and (2) that the plaintiffs could not be held to have been in adverse possession of the land in suit, because they were lambardars and because they were co-sharers still to some extent in the principal *khatas* even after the auction-sale; and then he proceeded to consider a plea of the defendants that by reason of an order passed in December, 1924, the question of title in the land was *res judicata* against the plaintiffs, and decided that this order of the partition court could not be regarded as *res judicata* as against the plaintiffs. In view, however, of the first two findings he dismissed the plaintiffs' suit. On appeal the Subordinate Judge

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of Mutra came to no decision on the question whether the defendants acquired an interest in the *shamlat khata* by reason of the auction-sale in 1900. He held that the revenue court decree under section 164 operated as *res judicata* in favour of the plaintiffs. He agreed with the trial court that the order of the partition court, dated the 9th of December, 1924, did not operate as *res judicata* as against the plaintiffs Lastly, he held that the plaintiffs had made out their plea of adverse possession for more than twelve years.

The decree of the revenue court in the case by the defendants against the plaintiffs for their share of profits under section 164 does operate as negativing the title of the defendants in the *khata* in dispute. We find that the revenue court purported to determine the question of title on the ground that the defendants were not recorded as co-sharers In other words, it decided the question of title under clause (3) of section 199 of the Agra Tenancy Act. Now it is immaterial whether that court was right in holding that the fact of the present defendants being recorded as co-sharers in the principal pattis amounted to their being recorded as co-sharers for the purpose of land in the *shamlat patti* or not. The court was entitled to interpret the village papers and to take the view that the defendants were not recorded co-sharers. In pursuance of this view, it was entitled to determine the question of title under section 199 (3) of the Agra Tenancy Act No appeal was filed against its decision Consequently, that decision is final. The question is whether it can operate as *res judicata* in this case. It has been consistently held by this Court that a decision of a revenue court under section 199 (3) of the Agra Tenancy Act operates as a decision by a civil court for the purpose of *res judicata* The present suit is within the jurisdiction of a Munsif, namely, the

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civil court of the lowest jurisdiction. If the revenue court is for the purposes of *res judicata* to be treated as a civil court, it must be deemed to have decided the matter as a Munsif at least. It must, therefore be held to have been competent to decide the present suit As an authority for this we need only mention the cases of *Thakur Hanwant Singh* v. *Jhamola Kunwar* (1) and *Baru Mal* v. *Sunder Lal* (2).

As regards the order of the partition court we are unable to agree with the lower courts that this order does not operate as *res judicata* in favour of the defendants. This order was as follows :—

"The sale-deed shows that *shamlat* was also sold The applicant should seek his remedy from civil court. Objection is rejected "

The partition court after passing this order proceeded to prepare the lots and to submit the partition proceeding referred to in section 114 of the revenue court to the Collector It could not have done this, if the order quoted above was intended by the court to be a reference of the parties to the civil court under section 111 (1) (*b*) of the Land Revenue Act The order clearly states that the *shamlat* was also sold and this clearly amounts to a declaration of the title of the auction-purchaser in the *shamlat* land The decision, therefore, contained in the order quoted amounts to a decision under section 111 (1) (*c*) It, therefore, had the effect of a decree of a civil court in virtue of section 112 of the revenue court. The reference in the order to a remedy in the civil court must mean by way of appeal There was no appeal against this decision and it has become final It, therefore, operates as *res judicata* against the plaintiffs in the same way as the decree in the 164 case operated against the defendants.

(1) (1922) 20 A.L.J., 340. (2) (1923) 21 A.L.J., 330

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The situation is, therefore, that we have two decrees operating as *res judicata*, one as against the plaintiffs and one as against the defendants We are of the opinion that in such a case it is the later decree that must prevail over the former, because the later decree shuts out consideration of the former. As an authority for this we would mention the case of *Dambar Singh* v. *Munawwar Ali Khan* (1) We, therefore, consider that the lower appellate court was wrong in deciding the present case in favour of the plaintiffs on the ground of *res judicata*.

As regards the plea of adverse possession set up by the plaintiffs the lower appellate court has allowed the plea on the ground that the plaintiffs have been receiving rent in respect of the *shamlat patti* for more than twelve years No receipt, however, of the rent could operate as adverse possession for the reasons set forth by the trial court The plaintiffs were both lambardars and as such, agents for the other co-sharers They were also themselves co-sharers in the principal *pattis* and any possession of them of the *shamlat pattis* would be possession not only on behalf of themselves but on behalf of the other co-sharers in the principal *pattis*. In view of the above findings it is not necessary for us to decide whether the auction-sale in 1900 did operate to vest in the defendants an interest in the *shamlat patti*. We are, however, of opinion that it did so. The interest of the co-sharers in the *shamlat patti* was merely appurtenant to their respective interests in the principal *pattis* and as such would pass along with the interest of the plaintiffs in those *pattis* transferred to the defendants by the auction-sale, irrespective of any specific mention in the sale-deed of the sale of the appurtenant interest.

(1) (1915) I L R , 37 All , 531

For the above reasons we allow this appeal and restore the decree of the trial court. The appellants will get their costs throughout.

Appeal allowed.

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MISCELLANEOUS CIVIL.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji.

IN THE MATTER OF THE FIRM NIHAL CHAND, KISHORI LAL *

1927 *February*, 18.

Act No XI of 1922 (Indian Income-Tax Act), sections 3 and 26—Effect as regards assessment of income-tax of the conversion of a joint Hindu family carrying on business as such into a registered firm.

A body of persons constituting a joint Hindu family who had for some years been carrying on business as such in Cawnpore converted themselves into a registered firm, with specified shares of each individual partner.

Held that for the purposes of the Indian Income-Tax Act, 1922, the registered firm was the "successor" of the joint Hindu family, and that as regards the first assessment after the conversion it was the firm that was liable to pay, but the principles on which the rate and the amount of the tax payable should be calculated were those applicable to the joint Hindu family who had been carrying on the business during the period on the profits of which the assessment was to be based. *In the matter of Begg, Sutherland & Co., Ltd.* (1), followed

THIS was a reference under section 66 (2) of the Indian Income-Tax Act, 1922.

The facts of the case sufficiently appear from the order of the Court.

The Government Advocate (Mr. *G. W. Dillon*), for the Crown.

Dr. *Kailas Nath Katju*, for the assessee.

WALSH and BANERJI, JJ.:—This is a case stated by the Commissioner of Income-Tax. Shortly stated

* Miscellaneous Case No 62 of 1927.

(1) (1925) I L R, 47 All, 715

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the matter arises in this way. A certain firm, Nihal Chand, Kishori Lal of Cawnpore, carried on business as a joint Hindu family, and were doing so between June, 1924, and June, 1925, the relevant period on which their profits had to be based for the assessment under discussion, their practice being to keep their accounts from June to June. They purport to have effected partition on the 10th of April, 1926, by means of a deed, in respect of which they ceased to carry on business as a joint Hindu family and constituted themselves a partnership with specified shares. Whatever legal effect that partition might have in other respects, it had no effect under the Indian Income-Tax Act until the 12th of June, 1926, when the deed was registered From that date they must be treated as a registered firm under the Act. The result of that transaction was that they ceased to carry on business as an undivided Hindu family and began to carry on the same business as a registered firm. These two terms are dealt with in two separate definitions in sub-section (9) and sub-section (14), respectively, of section 2 of the Indian Income-Tax Act., Although Dr *Katju*, their counsel, protested against the view, we have no doubt that as a matter of law and for the purpose of this Act, the registered firm on the 12th of June, 1926, became the successor of the Hindu undivided family in the carrying on of the business. The business may have been the same. It was undoubtedly carried on by a totally different legal person. From that moment the assessee was the registered firm It could not be the Hindu undivided family, because the undivided family ceased to exist as a person carrying on the business, so that the registered firm had the duty of making the return and had the obligation of making the payment due as assessee This, however, does not dispose of the

question. As was said in *In the matter of Begg, Sutherland & Co., Ltd.* (1),—

" the conversion of a firm into a company "—the principle applies equally to the conversion of a joint Hindu family into a registered firm—" does not in any way affect the profits made by the firm before the conversion or the legal liability to income-tax which already existed before the conversion. . . . The liability to assessment is not conclusive as to the chargeability in respect to the period for which such assessment is made."

Possibly that language is not so clear and comprehensive as it might be, but the Court there was dealing with a negative case, that is to say, it was rejecting the suggestion that the new assessee, who would not have been liable to super-tax if he had carried on the business during the period under consideration, was liable to pay super-tax for such period, although his predecessor in business would not have been liable if he had continued the business as before and had been the assessee

We think that this is made even clearer by the machinery provided by the Act, upon which the Court in that case did not dwell. Having discovered your assessee, it is then necessary to see what it is he is liable for by the Act. By section 10 the tax shall be payable by the assessee, under the head of " business " in respect of the profits or gains of any business carried on by him. What profits and gains those are, are prescribed by section 3, which provides that the tax should be charged at the rate or rates applicable to the total income, profits and gains of the previous year, and every individual company, firm and Hindu undivided family. You, therefore, have to look at the profits of the business in the previous year, by whomsoever it was carried on, and if the rate chargeable depends upon the constitution of the firm or company which carried it on, you must look to see what

(1) (1925) I L R , 47 All , 715 (721)

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IN THE MATTER OF THE FIRM NIHAL CHAND, KISHORI LAL.

was the firm or individual which carried it on If such individual or firm is not by law chargeable for super-tax, then the rate to be charged on the profits of that previous year must not include super-tax. If, on the other hand, the individual or firm carrying on the business in that previous year is chargeable with super-tax, the rate charged upon the assessee must include that super-tax, for, as in the case of *Begg, Sutherland & Co*, which is really the converse of this case, the assessee is not necessarily the person who was carrying on the business and making the profits of the previous years upon which the assessment made upon him has to be based. In our view, section 44 makes this abundantly clear. It deals with liability in the case of a business which has been carried on by a firm and been discontinued. Discontinuance may consist of various forms It may mean total abandonment or extinction, it may mean self-extinction for the purpose of reconstruction under another form. In this case, the business as carried on by the undivided Hindu family was discontinued in the eyes of the law and in accordance with the provisions of this Act, on the 12th of June, 1926, when the deed was registered. It was recommenced by the registered firm from that date, and section 44 preserves the existing liability at the time of such discontinuance and makes every member of the firm, which has been discontinued, jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm up to the date of such discontinuance, that is to say, the profits and the rate chargeable thereupon as provided by section 3 It appears to us that section 44 could not have been designed for any other purpose, and applies without any straining of the language. Section 26 is equally clear, but in our view it applies to a different consideration namely, the

ascertainment of the assessee within the meaning of section 2 at the time when the assessment is made, and it does not affect the rate or the period in respect of which the profits have to be computed. When any change occurs in the constitution of a firm or when any person has succeeded to any business,—and we find that the registered firm succeeded to the business of this undivided family,—the assessment shall be made on the firm as constituted at the time of making the assessment, that is to say, in this case on the registered firm.

The machinery of the Act seems to be consistent and carefully designed for dealing with every possible contingency which may arise in business. We agree with the principle laid down in *Begg, Sutherland & Co.*, and are of opinion that the decision in this case follows from it as a necessary corollary. Our answer to the question stated in paragraph 9 of the Commissioner's case is that the rate to be assessed upon the income, profits and gains of the accounting period, is to be determined by the fact as to who was in fact carrying on the business and making such income, profits and gains during the accounting period. In other words, they must be assessed on such income, profits and gains of a Hindu undivided family, the liability for payment thereof falling on the assessee, the registered firm which is the successor to the joint family which has ceased to carry on the business. The assessee must pay the costs of this reference. We might mention that the question of the company in *Begg Sutherland & Co's* case having become the successor of the firm as assessee within the meaning of section 26 of the Indian Income-Tax Act, was not disputed by the late Mr. *J. M. Banerji*, who argued on behalf of the company. We assess the fee of the Government Advocate as Rs. 100.

MISCELLANEOUS CIVIL.

Before Sir Cecil Walsh, Acting Chief Justice, and Mr Justice Banerji

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IN THE MATTER OF DINA NATH HEM RAJ *

Act No XI of 1922 (Income-Tax Act), sections 64(3) and 66—Principal place of business—Dispute between assessee and income-tax authorities—Assessment made in face of assessee's request for a case to be stated—Rule issued by High Court directing Income-tax Commissioner to state a case

Three firms, viz, Dina Nath Hem Raj of Calcutta, Diwan Chand and Sons of Lahore and Naram Das of Cawnpore, entered into a partnership for the special purpose of carrying out a contract entered into by Dina Nath Hem Raj with the East Indian Railway Company for the supply of castor-oil seeds at Manauri on the East Indian Railway. The three firms were interested to the extent of 8 annas, 4 annas and 4 annas, respectively, but the Calcutta firm was evidently the originator, financier and head of the combine. The contract was made in Calcutta, and payments received were made to an account kept in Calcutta; but, as the delivery of the seed had to be at Manauri, most of the purchases and other dealings took place at Cawnpore, and some of the accounts relating to the contract were kept there. The dealings of the partnership lasted for about a year, and it then broke up. The question thereafter arose whether income-tax on the profits derived from this contract was to be assessed at Cawnpore or Calcutta. The Income-Tax Officer of Cawnpore, in spite of the firm's objection, assessed the firm there. They appealed, but their appeal was dismissed. They next applied to the Commissioner of Income-Tax to state a case under section 66 of the Income-Tax Act, 1922, but the Commissioner refused to do so. They next applied to the High Court for a rule directing the Commissioner to state a case. This they obtained, and a case was accordingly stated.

On the case so stated, *held*—

(1) that if the question as to the place of assessment had been decided in accordance with section 64(3) of the Act

* Miscellaneous Case No 512 of 1926.

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the High Court could not have interfered, but as in the circumstances of this case there was a total failure of the income-tax authorities to apply the provisions of section 64(3), and an illegal assumption of authority by the Income-Tax Officer of Cawnpore, the assessee had a right to have a case stated, and the issuing of the rule was within the jurisdiction of the High Court;

(2) that the facts found afforded no evidence that the principal place of business of the firm was at Cawnpore, but, on the contrary, fully supported the contention that the firm's principal place of business was at Calcutta;

(3) that the Income-Tax Officer of Cawnpore had no right to make a summary assessment whilst a *bonâ fide* dispute as to the place of assessment was going on, and it was his duty to apply to the superior income-tax authorities under section 64 (3) of the Act for a decision as to the place of assessment; and section 64(4) could not justify the assessment.

THIS was a case stated under section 66(3) of the Income-Tax Act, 1922, by the Commissioner of Income-Tax in answer to a rule issued by the High Court. The facts of the case are thus stated in the Commissioner's return:—

A firm which carried on business in Cawnpore in the year 1923-24 for the supply of castor-seeds to the East Indian Railway at Manauri under the name of Messrs Dina Nath Hem Raj was assessed by the Income-Tax Officer, Cawnpore, under section 23 (4) of the Indian Income-Tax Act, 1922, on the 8th of December, 1924. The assessee filed a petition under sections 27 and 35 of the Income-Tax Act on the 8th of January, 1925, asking for the cancellation and rectification of the assessment. The petition was rejected and the Income-Tax Officer's decision was upheld on appeal by the Assistant Commissioner of Income-Tax, Cawnpore, in an order, dated the 7th of October, 1925. The assessee presented a petition to the Commissioner of Income-Tax on the 3rd of November, 1925, asking that the Commissioner should interfere in review

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under section 33 of the Income-Tax Act or, in the alternative, should refer the case to the High Court under section 66 (2) of the Act for decision on certain points of law. The Commissioner in an order, dated the 23rd of December, 1925, held that no question of law arose out of the appellate order of the Assistant Commissioner and declined to state a case The High Court has now issued an order under section 66(3) of the Income-Tax Act requiring the Commissioner to state a case on certain points of law.

2 The facts of the case are somewhat intricate, but the Commissioner will attempt to state them as briefly as possible. They are as follows :—

The firm of Messrs Dina Nath Hem Raj of Calcutta secured a contract in its own name for the supply of castor-seeds to the East Indian Railway during the year 1923-24 The contract was given in Calcutta and payments on its account were made by the railway to the contractor in Calcutta For the purpose of executing the contract an unregistered firm was established comprising the following partners :—

(i)	The firm of Messrs. Dina Nath Hem Raj which secured the contract .	8 annas.
(ii)	The firm of Messrs. Diwan Chand and Sons of Lahore .	4
(iii)	The firm of Messrs Narain Das of Cawnpore .	4 ,,

No deed of partnership was drawn up and the relationship among the partners is obscure On the one hand Messrs. Narain Das Lachman Das made a statement before the Income-Tax Officer of Cawnpore, saying that they had held a 4-anna share in the castor-seed business carried on at Cawnpore and that most of the purchases had been made by them. The Income-Tax Officer had also received information

from another source that the partnership was arranged in Cawnpore and was perfectly genuine The Income-Tax Officer also learnt, as stated in his letter to the Income-Tax Officer, Calcutta, dated the 27th of October, 1924 (copy enclosed, Appendix A) that no control or management of the business was in the hands of the Calcutta firm and that the accounts were maintained by Messrs. Narain Das Lachman Das and that the profit was worked out by them. On the other hand, Messrs. Dina Nath Hem Raj of Calcutta claimed that the partnership was instituted in Calcutta, that all the business of the firm was carried out there so far as purchases were made in different places and that the firm was dissolved in Calcutta by a deed executed there in July, 1924 They also contended before the Income-Tax Officer, Calcutta, that "Messrs Narain Das Lachman Das could not claim a higher position or status in the firm of Messrs Dina Nath Hem Raj than other purchasing agents similarly making or supervising purchases at different centres."

3 When the question of issuing a notice for a return of income under section 22(2) of the Income-Tax Act arose some doubt was felt by the Income-Tax Officer, Cawnpore, and also by the Income-Tax Officer, Lahore (apparently the place of origin of the Calcutta firm), as to the action to be taken, and these officers made inquiries from each other and also from Calcutta. On receipt of the inquiries from Lahore, an Income-Tax Officer in Calcutta began an investigation and called for the accounts of the firm, the 18th of September, 1924, being fixed for the purpose. But on the 8th of September, 1924, the Income-Tax Officer, Cawnpore, cancelled his inquiry as the business in Cawnpore had, on the information received by him, been conducted by a separate unregistered

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firm so that the profits would be assessed in Cawnpore The firm of Messrs. Dina Nath Hem Raj of Calcutta appeared before the Income-Tax Officer in Calcutta on the 18th of September, 1924, and claimed assessment in Calcutta. The firm was required to put in an affidavit and did so, but the Income-Tax Officer refused to accept it without corroborating evidence and called for that evidence on the 4th of November, 1924. The case was postponed at the instance of the firm till the 18th of November when Babu Dina Nath appeared and in support of his contention produced (i) letters to the Calcutta firm from the East Indian Railway, (ii) a municipal licence to trade in Calcutta which the Income-Tax Officer in Calcutta apparently considered to be of little weight as the firm of Messrs. Dina Nath Hem Raj of Calcutta were already carrying on business there, and (iii) a number of telegrams and letters, most of which were irrelevant but some of which showed that details of the purchase of goods at, and their despatch from, Hathras were reported for information to Calcutta, while others were from Cawnpore asking for funds and (in one case) requesting apparently that arrangements be made in Moradabad for the loading of wagons. A pass book of the Imperial Bank was produced to show numerous debit and credit entries in the name of the Calcutta firm. The Income-Tax Officer decided to form no conclusion at the moment on the contention of the firm but at the same time assumed jurisdiction by directing the issue of a notice calling for a return of income under section 22(2) of the Income-Tax Act. Unfortunately this assumption of jurisdiction was not communicated to the Income-Tax Officer, Cawnpore, when the copy of the note recorded on the 18th of November, 1924 (which has already been seen by

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4. In the meantime the Income-Tax Officer, Cawnpore, had been corresponding with the Income-Tax Officer dealing with the case in Calcutta, claiming jurisdiction in the matter. He also entered into correspondence with Messrs Dina Nath Hem Raj, of which a copy is enclosed in Appendix B (letters of the Income-Tax Officer, dated the 8th of September, 1924, and the 24th of October, 1924, and of the firm dated the 21st of October, 1924, and the 28th of October, 1924). In his letter of the 8th of September the Income-Tax Officer enclosed a notice calling for a return of income, which in its letter of the 24th of October the firm asked the Income-Tax Officer to cancel. The latter replied on the 24th of October that the assessment would be made in Cawnpore and asking the firm to comply with the notices issued by him, at the same time warning the firm of the disabilities likely to be incurred in case of non-compliance To this the firm demurred (28th of October)

5. On the 8th of December, 1924, the Income-Tax Officer, Cawnpore, made an assessment on the firm, informing the Income-Tax Officer in Calcutta of his action. The firm of Messrs. Dina Nath Hem Raj wished the Income-Tax Officer in Calcutta to proceed with its assessment including the profits from Cawnpore, but after consideration that officer decided to deal with the income in Calcutta alone

[The Commissioner then went on to set forth his conclusions and the arguments in support of them at considerable length.]

On the case stated being laid before the Bench which issued the rule

Dr. *Kailas Nath Katju*, for the applicant

The Government Advocate (Mr. H. Dillon), for the Crown.

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WALSH, A. C. J., and BANERJI, J.:—This is a case stated under section 66 of the Income-Tax Act of 1922. The questions upon which the case was stated are as follows:—

"(1) Whether, in view of the facts and circumstances, as stated in this special case, of the petitioner's business in connexion with the purchase, sale, receipt and distribution of profit, of castor-seeds delivered to the East Indian Railway at Manauri, the business was, during the material period, carried on in Cawnpore within the meaning of section 64.

(2) Whether, if it is eventually found that the petitioner's business was carried on in Cawnpore, the income-tax authorities acted in accordance with the Act in assessing them by way of summary assessment while a *bonâ fide* dispute was going on as to whether they were liable to be assessed in Cawnpore at all.

(3) Consequential upon the foregoing questions whether it was the duty of the income-tax authorities to obtain a decision under section 64 (3), and

(4) Whether, having regard to the fact that the particular venture had come to an end, and the members of the partnership who had taken part in it were no longer carrying on business at all the income-tax authorities at Cawnpore had jurisdiction to make the assessment upon the firm, even if it had carried on business at Cawnpore, such business no longer existing."

The Commissioner has requested permission to raise another question, which we will deal with in a moment, and which in substance challenges the jurisdiction of the High Court to direct a case to be stated in this matter, owing to the provisions of section 64.

Before dealing with this question of jurisdiction it is necessary to make two preliminary observations. As a rule it is better in a statement of a case to confine the case to findings of fact, and to the expression of the Commissioner's opinion upon the points raised, and not to burden the case with arguments, or in the case to question the jurisdiction of the Court to require a case to be stated. We would not, however, be taken to hold that the Commissioner, or any other body, in a case where the Act provides for a case to be stated for the opinion of the High Court, has no right to question the jurisdiction of the Court in directing the particular case in question. In order to make our meaning clear, we would point out that an order for a case to be stated is in the nature of what is known in Calcutta and in England as the issue of a rule *nisi* to show cause on certain questions indicated in the order made by the High Court. The Commissioner or other authority, in stating the case in effect shows cause against the contention of the other side, and in showing cause he is clearly at liberty, when he appears before the Court to argue the case, to take the objection that under the law there was no power to issue the rule, or to direct the case to be stated, and that, therefore, the High Court has no jurisdiction to decide the question raised in the case.

The second observation is that in strictness the objection should have been taken at the time of the argument, namely, the 22nd of October, 1926, when the question of whether it was a fit case in which a case ought to be directed to be stated was discussed and this Bench made the order. It so happens that in this particular instance the matter came before the High Court twice. Mr. Justice KANHAIYA LAL and Mr. Justice ASHWORTH, sitting together on the 14th of July, 1926, issued notice to the Commissioner

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of Income-Tax and to the Government Advocate, without directing a case to be stated, so that a further preliminary stage occurred when the Government Advocate appeared on behalf of the Commissioner of Income-Tax before this Bench in October. In their order the abovementioned learned Judges stated that "it will be a further point of law whether the decision on the evidence, if any, could be arrived at at all in these provinces, without reference to the Commissioner of Income-Tax of Calcutta" This was clearly directed to section 64 (3), which is the sub-section on which the Commissioner now relies; and the third question of those which this Bench ordered to be stated by their order in October, deals with the same sub-section. No objection was made in October on behalf of the Commissioner that this sub-section concluded the matter and ousted the jurisdiction of the High Court under section 66

It appears to us that the Income-Tax Officer of Cawnpore, who dealt with this matter in the ordinary course of his duty, wholly overlooked this provision, and that the Commissioner's attention was not drawn to it, and, further, that it is entirely owing to this oversight that the matter has got into the complicated condition in which we now find it.

The question which has arisen between the assessee and the income-tax authorities is really a perfectly simple one, namely, whether the partnership, or firm, formed for a special undertaking, being the assessee, had its principal place of business in Cawnpore or Calcutta. It is said that the facts of the case are intricate, but we do not agree. As will appear hereafter, the facts relating to this particular business, which was only of a temporary character, are by no means uncommon, and according to the ordinary tests which are applied in such cases it ought not to be

difficult to find as a fact where their principal place of business was, although the matter has now come before us really as a question of law to decide whether the income-tax authorities had any evidence upon which, having regard to all the facts of the case, they could hold that the principal place of business was in Cawnpore. What is intricate is the legal tangle into which the simple issue which arose has been allowed to drift, and the unfortunate delay which has taken place in arriving at a final settlement of the question which became acute in October, 1924, and is still unsettled after a controversy of over two years. The initial mistake appears to us to have been the assessment of the firm by the Income-Tax Officer in Cawnpore under section 23 (4) of the Act on the 8th of December, 1924, not as of a branch business carried on in Cawnpore, or of the profits arising within the jurisdiction of Cawnpore, but upon the presumption that the principal place of business was in Cawnpore, when a question had arisen between the assessee and the income-tax authorities with regard to that very question, and had not been decided in accordance with the provisions of the Act contained in section 64 (3).

That a question had arisen within the meaning of section 64 (3), there cannot be the slightest doubt. In a letter, dated the 8th of September, the Income-Tax Officer expressed his intention of making the assessment in Cawnpore of the whole profit of the business in castor-seeds, carried on in the former year in partnership. The assessee, the name of the firm being taken from the principal partner, namely, Messrs. Dina Nath Hem Raj, 10, Cross Street, Calcutta, writing from Calcutta on the 21st of October, informed the Income-Tax Officer that Calcutta was the principal place of business of the partnership.

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and that they were prepared to prove that fact to the satisfaction of the Income-Tax Officer They stated that they had already filed an affidavit in Calcutta to that effect On the 24th of October the Income-Tax Officer answered that Calcutta could not be considered the principal place of business, and that no part of the business was carried on at Calcutta, and insisting upon his right to assess the profits of the whole business in Cawnpore, and informed the assessee that he had written to the Income-Tax Officer at Calcutta to the same effect. Finally the assessee, on the 28th of October, wrote from Calcutta regretting that they were unable to see eye to eye with the Income-Tax Officer in this matter They seem to have acted with circumspection in this matter, except that the branch in Cawnpore failed to produce their books They went on to say that, although it did not matter much where the assessment was made, in Calcutta or in Cawnpore, they asked the Income-Tax Officer to take into consideration the fact that it would cause serious inconvenience and loss to them if the assessment was made in Cawnpore, and they gave reasons for this contention, pointing out, what is admitted to be correct, that the business relating to the castor-seeds was done by the Calcutta firm with the East Indian Railway, and that the contract was entered into in Calcutta, and that as a matter of fact the Income-Tax Officer in Calcutta was already arranging to take evidence upon the point There may be some difference in the method of calculating profit in the different provinces This is a matter for the income-tax authorities We were told that the payments by the East Indian Railway amounted to 14 lakhs, and that the Calcutta authorities had assessed the profit at one lakh, while in Cawnpore it had been assessed at 3 lakhs. In the former case a profit of one lakh, upon an outlay of 13 would be nearly 8 per cent In

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the latter case the outlay would be only 11, and the profit 3, equalling more than 26 per cent: but the latter was admittedly arrived at *ex parte* without any materials provided by the firm, which may account for the very large difference. The suggestion seemed to be made, in argument that the assessee had for this reason contended for Calcutta, and it is, therefore, right to emphasize that the question about the principal place of business arose before any assessment had been made, and that there is nothing in the case to show that they did not act *bonâ fide* in raising the question.

It is quite clear, therefore, that in October, 1924, a question had arisen within the meaning of the section. It is equally clear that both parties were either unaware of, or ignored, section 64 (3). This question having arisen, the Income-Tax Officer, subject to a proviso hereafter to be mentioned, had no jurisdiction to decide the question of the principal place of business, and certainly no jurisdiction to assume it, and no right to assess the firm on the profits of the whole business as though its principal business were in Cawnpore, a question which was still undecided. The Act provides that where the question about the principal place of business is between places in more provinces than one, it shall be determined by the Commissioners concerned; and, if they are not in agreement, by the Board of Inland Revenue, and that the assessee shall have an opportunity of representing his views. The Act does not go on to say who shall set the Commissioner in motion, but the reasonable inference to be drawn from the language used is that that is the duty of the Income-Tax Officer. The sub-section itself contains a direct reference to the assessee and provides that the assessee shall have an opportunity of representing his views

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before the question is determined. An express provision of that kind seems to exclude an implied provision that the duty is thrown upon him of securing the determination of the question On the other hand, the Income-Tax Officer is the person who first becomes aware of the question which has arisen, and it seems reasonable to hold, and it certainly simplifies the working of the section, that he should immediately communicate the fact of such question having arisen to his own Commissioner with whom he is in constant touch, and who is then in a position to exercise the function imposed upon him, as the case may be, giving the assessee an opportunity of representing his views What is quite clear is that the Income-Tax Officer cannot himself decide this question, or act as though it had been determined in accordance with the provisions of this section, and that if he proceeds to prejudge the issue, or to act as though it had been determined and to assess the firm as though their principal place of business was in his own jurisdiction, in spite of the dispute being still undetermined, he is doing something not authorized by the Act—in other words, an illegality It is quite true that the following subsection, namely, sub-section (4), provides that "notwithstanding anything contained in this section, every Income-Tax Officer shall have all the powers conferred by or under this Act on him in respect of any income, profits or gains accruing or arising or received out of the area for which he is appointed" This means that he can proceed to assess a branch, as such, if he has the materials for so doing What would be the result of such an assessment of the branch if the decision afterwards is that the principal place of business is in another province, we need not stop to inquire It is perfectly clear from the language used by the Income-Tax Officer throughout, and in the letters from which we have quoted, which

are set out in full in the case, that he proceeded to assess the firm on the 8th of December, 1924, as though its principal place of business was in Cawnpore.

We now turn to the actual question raised by the Commissioner. The question is not stated in a very satisfactory manner. He asks, "has the High Court power, under section 66 of the Indian Income-Tax Act of 1922, to overrule a decision of an Income Tax Officer concerning his power to assess, in the face of the provisions of section 64 of the Act, which lay down a special procedure and a special forum for the decision of disputes as to that power." In one sense of that embarrassing question the answer must be "*no.*" The High Court, indeed, has no power to overrule anything done by an Income-Tax Officer or the Commissioner. Where such a question, as we have indicated, arises as to the principal place of business, and such question has been determined by the Commissioner, or where the question is between places in more provinces than one, by the Commissioners concerned, or by the Board of Inland Revenue, such decision is final. There is no right of appeal, and no power in the High Court to interfere with it, nor do the provisions of section 66, which give the assessee a right to require the Commissioner to refer to the High Court, any question of law, or, in the event of his refusal, to apply to the High Court for a statement of the case, apply to a decision made under section 64. No doubt under section 66(1) the Commissioner may on his own motion refer a case to the High Court on any question of law arising in the determination of the question under section 64, but this seems to be the only way in which the determination of such question can be brought before the High Court. On the other hand, the question put by the Commissioner, applied to the circumstances of this case, appears to be misleading,

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because it assumes that the High Court was asked to overrule a decision of the Income-Tax Officer concerning his power to assess, a decision which in the face of the provisions of section 64 he had no power to make, and it assumes also that the special procedure and special forum, under section 64, had been adopted, when it is admitted that it had not.

We are compelled to hold in this case that there being a total failure on the part of the income-tax authorities to apply the plain provisions of section 64, and, on the other hand, an illegal assumption of authority by the Income-Tax Officer in Cawnpore to assess the assessees, as though their principal place of business had been determined to be in Cawnpore, the existence of an alternative remedy under section 64(3) does not affect this case, and cannot be held to be a bar to the right of the appellant to have a case stated, and to the jurisdiction of the High Court to answer those questions in the way in which it holds they ought to be answered

Owing to the disregard of the machinery provided by section 64 (3) and to the wholly irregular proceedings, as they appear to us to have been, which have necessarily followed upon the action of the Income-Tax Officer in Cawnpore in assessing the profits of the firm or of this special business as though the principal place of business had been determined to be in Cawnpore, the subsequent proceedings appear to have been irregular in form and infructuous in substance. We need not dwell upon the intermediate proceedings, which took place between the order of the 8th of December, 1924, and the order of the Commissioner of the 23rd of December, 1926, refusing to state a case on a question of law, which question was undoubtedly raised in the course of the appeal, and discussed by the Commissioner in his order, and held by him to be a question of fact only To refuse to

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answer the questions on the ground that the procedure by which this stage has been reached is irregular, would in our view be a denial of justice. The responsibility for the tangle which has occurred appears to us to lie almost, if not entirely, on the income-tax authorities, by which we mean the failure of the Income-Tax Officer in Cawnpore to draw the attention of the Commissioner to the fact that a dispute had arisen about the principal place of business. The controversy having drifted away from the prescribed method or machinery for determining it which is provided by the Act, and each of the parties to it having made up their minds that they were right, it is not surprising that both of them indulged in arguments and indeed in procedure which appear to us, strictly regarded, to be irregular, and as things now stand, to be irrelevant, but inasmuch as the whole trouble has arisen from the initial irregularity on the part of the income-tax authorities, and inasmuch as also the assessee has been assessed, in our view, with fundamental irregularity, and in any case in default by an *ex parte* decision, when as a matter of fact he has committed no default, and inasmuch as also, in our view, if the law is correctly applied to the evidence, the only proper inference which any court of law could draw from the facts is that the principal place of business is in Calcutta and not in Cawnpore, it seems to us that it would be a denial of justice, either for us to refuse to answer the questions raised by the case, or for the Commissioner to deal finally with the matter otherwise than in accordance with the answers which we now proceed to give

In our previous order we endeavoured to make it plain how a mixed question of fact and law, or how a question which is no doubt in one sense a question of fact, may become a question of law or, in other words,

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how it may be said that taking all the facts together there is no evidence upon which a court of law could come to any but one conclusion. The facts to be collected from the case are as follows:—

(1) This firm, which was an unregistered partnership firm for a special venture for dealing with castor-seeds under a contract with the East Indian Railway for one year, in 1923-24, consisted of three existing firms, one the firm of Dina Nath Hem Raj of Calcutta, who held the lion's share, namely, 8 annas, and after whose name the temporary partnership was named, a firm of Messrs. Diwan Chand and Sons of Lahore, who held a 4-anna share, and the firm of Narain Das of Cawnpore who held the other 4-anna share.

(2) The Calcutta firm started and formed the partnership and clearly financed it. The inference may fairly be drawn that it would not have come into existence without their instrumentality. They might have succeeded in inducing other firms in Cawnpore, or Lahore, to join the partnership, but there is nothing to show that either the firm in Cawnpore, or the firm in Lahore, would have formed the partnership, or have become members of any such partnership if it had not been for the Calcutta firm. The Calcutta firm were, therefore, the moving spirit and apparently the financiers.

(3) The partnership was ultimately dissolved by deed in July, 1924, in Calcutta.

(4) The contract with the East Indian Railway was made in Calcutta.

(5) Payments for the seeds supplied, or distributed to the order of the East Indian Railway, were made to Calcutta.

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(6) A banking account was kept in the Imperial Bank in Calcutta.

(7) The ordering and direction of the seeds, which were purchased and subsequently sold to the East Indian Railway and delivered at Manauri, took place at Cawnpore, and this no doubt was the centre of the work which has been carried out in compliance with the contract. It was not unlike a mill or factory in a country district, belonging to a firm with its head office in a neighbouring town.

(8) The firm in Cawnpore, who were partners, carried on extensive operations as purchasers of the goods, which were to become the property of the whole partnership, and which were to form the source of profit.

(9) The correspondence with the East Indian Railway was conducted from Calcutta.

(10) There is correspondence from Cawnpore asking Calcutta for funds

(11) There is correspondence making reports to Calcutta of the work at the local centres or branches

(12) There is correspondence asking Calcutta to make arrangements for loading wagons in Moradabad.

The test in such a matter may be given in language quoted from Mr. *Sastri's* excellent book on the law and practice of income-tax :—" Ordinarily the principal place of business of a firm or company is the place at which the persons directing the company or firm do their business." The fact that goods are manufactured in one place does not make that place necessarily the principal place of business. Where business is carried on in many places, or at different branches, it may be said that the business is carried on in each of those places, though neither of them may

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IN THE MATTER OF DITA NATH BAL

be the principal place of business. In our view the Income-Tax Officer in particular, and to some extent the Commissioner, misdirected themselves by directing their attention to the fact that extensive business was carried on in Cawnpore As a matter of law, we think the Commissioner has misdirected himself in relying upon the fact that an expert partner, whose importance was as great as that of any other partner, was doing the practical work in Cawnpore and that he was at least equal, if not greater, in importance than the financing partner We also think that he misdirected himself in the case in holding, as he appears to have held, that the fact that the Cawnpore firm were making purchases as far afield as Moradabad affected the question whether theirs was the principal place of business Although in the end he answers the first paragraph in the affirmative, he frames his finding on this point in language which is far from being convincing,—saying that "it is not established that the business was not carried on in Cawnpore." He rather thinks that it is a fair inference that the business was conducted in Cawnpore. In the way in which these findings are stated, this is not a decision of the question at all Undoubtedly a great deal, if not the bulk, of the practical business was conducted in Cawnpore. But that is not the sole, or indeed the important, test in considering, in a case like this, whether Cawnpore was the principal place of business

Question (1) was intentionally framed so as to leave open the question whether the business was solely carried on in Cawnpore But that question is now not open, and we have no hesitation in coming to the conclusion that, on the facts stated in the case, there is no evidence upon which it can be held that the principal business was in Cawnpore, and that if

that had been found to be the fact, in a suit, this Court would have been compelled on this evidence to overrule the finding as a question of law in second appeal

The answer to question No. (2) is "*No.*" The matter should have been decided in accordance with section 64 (3)

The answer to question No. (3) is "*Yes.*"

The answer to question No. (4) is now superfluous, but it is clear that if the business had been carried on wholly in Cawnpore, the fact that it no longer existed would not deprive the income-tax authorities in Cawnpore of jurisdiction to make the assessment

We think that although the assessee has been somewhat hardly treated in this matter, he must have known that he had no business to destroy his books while this important question of appropriate assessment was still outstanding What effect that destruction may have upon the ultimate decision arrived at by the income-tax authorities is a matter for them, but having regard to that circumstance we think justice will be done by ordering both parties to pay their own costs of these proceedings.

APPELLATE CIVIL.

Before Mr. Justice Boys and Mr. Justice Kendall

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LACHMI NARAIN ACHARI (DEFENDANT) *v.* MITTHU BHAGAT AND OTHERS (PLAINTIFFS) *

Civil Procedure Code, section 73 and order XXXIV, rule 13—Mortgage—Sale in execution—Surplus proceeds made over to mortgagee in part satisfaction of other mortgages not in suit, and without consent of mortgagor—Suit by mortgagor to recover money withdrawn by mortgagee.

Plaintiff, on different dates, executed three mortgages in favour of defendant Defendant sued on the first, without mentioning the other two, and obtained a decree The mortgaged property, being brought to sale, realized a sum considerably in excess of what was due to the decree-holder The decree-holder then applied to the court for permission to withdraw the surplus sale-proceeds and apply them to the satisfaction of his other mortgages, and he obtained an order and withdrew the money *Held*, on suit by the mortgagor for refund of the money so withdrawn, that neither section 73 nor order XXXIV, rule 13, of the Code of Civil Procedure applied; the execution court was not justified in passing the order which it did, and the plaintiff was entitled to the decree claimed *Ram Narain* v. *Umrao Singh* (1), followed

THIS was a defendant's appeal in a suit praying for a decree for Rs 638 against the defendant on the allegation that the defendant had wrongly obtained payment of Rs 623-8-0 out of the surplus resulting from an auction-sale in execution of a decree on a simple mortgage obtained by the defendant against the plaintiff.

On behalf of a joint family certain property was made the subject of a simple mortgage in favour of the present appellant, Lachmi Narain, on the 9th of July, 1903, for a sum of Rs. 550 This was followed

* Second Appeal No 1537 of 1924, from a decree of K A H Sams, District Judge of Ghazipur, dated the 16th of July, 1924, reversing a decree of Ajaz Husain, Munsif of Ballia, dated the 28th of February, 1923

(1) (1907) I L R, 29 All., 615

by two similar subsequent mortgages in favour of the same mortgagee on the 26th of November, 1906, and the 21st of December, 1906, for a sum of Rs. 175 and Rs. 554, respectively.

The mortgagee Lachmi Narain brought a suit for sale on his first mortgage of the 9th of July, 1903, and brought the property to sale It fetched Rs 1,800. Only Rs. 1,176-8-0 was due on this first mortgage. There was, therefore, a surplus of Rs. 623-8-0 which, in ordinary circumstances the mortgagor would have been entitled to have paid over to him. The mortgagee had throughout these proceedings made no mention of the two later mortgages in his favour. When, however, he saw that there was a surplus available he put in an application asking that it might be paid over to him in satisfaction, so far as it would go, of his later mortgages. The mortgagor objected, but, despite his objections, the claim was allowed, the order giving the money to the mortgagee purporting to be passed under section 73 of the Code of Civil Procedure, and being dated the 29th of September, 1922. Two days later, the mortgagee withdrew the money.

The members of the joint family, represented by the plaintiffs here, feeling aggrieved by this order, and having no appeal against it, filed the present suit claiming a refund of the Rs 623-8-0 and interest thereon, Rs. 14-8-0. The plaintiffs alleged that the order under section 73 of the Code of Civil Procedure was without jurisdiction, that the two later mortgage debts were time-barred, and that no consideration passed. These three points were, of course, challenged, and further the defendant pleaded that "the plaintiffs are not at all competent to sue" The trial court dismissed the suit holding the order purporting to be under section 73 to be legal and that the later

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mortgages were not time-barred and that there was consideration. It did not frame any special issue as to whether the plaintiffs were competent to sue

The plaintiffs appealed and the lower appellate court, without deciding any other point, held that the two later mortgages were time-barred, the endorsements on them being not satisfactorily proved, and it decreed the suit The defendant mortgagee appealed to the High Court.

Pandit *Ambika Prasad Pande*, for the appellant

Munshi *Janaki Prasad*, for the respondents

The judgement of the Court (BOYS and KENDALL, JJ.), after stating the facts as above, thus continued :—

It was contended before us that the order of the first court was a legal order within the provisions of section 73 of the Code of Civil Procedure (but this was not pressed); that if it did not come within that section, it came at least within the spirit of it; that it was a proper order under order XXXIV, rule 13, that the finding of limitation was so unreasonable as to justify this Court in interfering with it; and, finally, that whether the order was valid or invalid, the plaintiffs were not competent to sue The defendant mortgagee, appellant here, is in effect asking us to hold that the plaintiffs have no remedy either by appeal or separate suit, even if they have been wrongfully deprived of their money

To consider first the applicability of section 73, and order XXXIV, rule 13 :—

In our opinion, the scheme of the Code itself indicates that it is not contemplated that surplus assets after an auction-sale should be paid out to a subsequent incumbrancer otherwise than with the

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consent of the mortgagor, that is to say, that the surplus cannot be paid over to the subsequent incumbrancer, if the mortgagor challenges the existence or the validity of the incumbrance or any portion thereof, at any rate where these matters have not been determined in the prior proceedings

The framers of the Code would appear to have considered it futile to give a court permission to pay over a surplus to a subsequent incumbrancer, where a mortgagor is a consenting party to such payment and does not challenge the existence or validity of the subsequent incumbrance or any part thereof. Clearly, any provision permitting the court to do so would be superfluous. There are, however, two cases in which there might be claimants in regard to whom it was desirable to give some directions First, with a view to stopping unnecessary litigation, provision was made in section 73 for the case of other claimants against the assets of the judgement debtor, who had already obtained decrees. A second case to be provided for was where there was a prior mortgagee, and that special case is provided for in order XXXIV. rules 12 and 13. This latter case is appropriately dealt with in the order which specifically deals with suits relating to mortgages, for it can only arise in a mortgage suit On the other hand, the provision for decree-holders coming in may arise in other kinds of suits, and, therefore, properly finds its place in the body of the Code.

Neither section 73 nor order XXXIV, rule 13, are applicable to the present case, which is the simple one of whether or not a subsequent incumbrancer is to be paid out of the surplus assets arising from the auction-sale

In a case like the present, where there was a contest as to the disposal of the surplus—a contest

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which had not been determined in the suit or in the execution proceedings—there is no provision for what might actually, though not in name, become a prolonged civil suit; and the court of first instance, and in this we agree with Mr. Justice P. C BANERJI's views in *Ram Narain* v. *Umrao Singh* (1), should have referred the claimant to a civil suit.

If a civil suit was the proper course to be followed in the first instance, it is clear that the aggrieved party, if an order has in fact been improperly passed against him, will, having no right of appeal, have his remedy in a civil suit

Holding, as we do, that the plaintiff has a right to sue, the rest is concluded by the finding on the facts by the lower appellate court that the later mortgages were barred by limitation. The court exercised a judicial discretion in weighing the evidence in regard to the endorsements of the payment of interest, and its finding is not open to attack in second appeal. The appeal is dismissed with costs

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Dalal.

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DARBARI LAL AND ANOTHER (PLAINTIFFS) *v.* MAHBUB ALI MIAN AND OTHERS (DEFENDANTS) *

Act No IX of 1872 (Indian Contract Act), section 140—Mortgage—Surety for payment of money due under a mortgage—Question of priority between the holder of a subsequent mortgage and a surety who had not discharged the principal's debt in full

In the year 1896 one *KA* entered into a collusive arrangement with his wife whereby his immovable property was made over to her in satisfaction of her claim for dower This arrangement was carried out by means of an arbitration

* First Appeal No 310 of 1923, from a decree of Ganga Prasad Verma, Subordinate Judge of Shahjahanpur, dated the 17th of April, 1923

(1) (1907) I L R , 29 All., 615

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and a decree in accordance with the award. A suit was, however, brought by *LP*, one of *KA's* creditors, to set aside this decree as a fraud on the creditors, and he obtained a decree in 1897. After this, *KA* and his wife jointly executed three mortgages, the first in favour of *LP*, the second in favour of another creditor *DL* and the third again in favour of *LP*. Whilst these three mortgages were outstanding, one *RB* became surety and paid off most of the money due under the three mortgages, excepting Rs. 12,500 due to *LP* and Rs. 1,500 due to *DL*. As security for these amounts, the widow and sons of *KA*, who had died some years previously, executed another mortgage in 1913.

Held on suit brought on this last mortgage—(1) that the widow had authority to execute it; *Chenvirappa* v. *Puttapa* (1), followed; and (2) that, inasmuch as the surety did not pay off the whole of the money that was owing to the creditors, but only part of it, the mortgagees rights under the mortgage of 1913 took priority over her claims.

THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *Kailas Nath Katju* and Pandit *Madan Mohan Raina*, for the appellants.

Munshi *Kamla Kant Varma* (for him Munshi *Ambika Prasad*) and Maulvi *Mukhtar Ahmad*, for the respondents.

MEARS, C. J., and DALAL, J.:—This was a suit brought in the court of the Subordinate Judge of Shahjahanpur, to enforce a mortgage of the 16th of January, 1913, executed by the wife and sons of one Khurshed Ali Mian, deceased. The plaintiffs also alleged that they had preferential right to the payment of the moneys secured by their mortgage in priority to one Rani Barkat-un-nissa.

The learned Subordinate Judge decided that the mortgage was effective in so far as it concerned the share of the wife and of the two major sons, defendants Nos. 1 and 2. He also held with regard to Rani

(1) (1887) I L R., 11 Bom., 708.

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Barkat-un-nissa that she stood on an equal footing as regards her advances with the plaintiffs The plaintiffs appealed from this decision, and the ground they took is that as between Khurshed Ali Mian and Musammat Latif-un-nissa, his wife, Latif-un-nissa was the owner of the entire property, and as such was competent to mortgage it They alleged the further ground that the sons and daughters were not competent to question the validity of an award and decree now about to be mentioned

In the year 1896 Khurshed Ali Mian was the owner of the property in dispute. He was in embarrassed circumstances, and by arrangement with his wife she put forward a claim to her dower. The matter was submitted to arbitration, and under the terms of the award the immovable property, the subject-matter of this suit, was transferred to her in extinguishment of her claim to dower. This award was dated the 6th of July, 1896. On the 18th of August of the same year a decree in terms of the award was passed by the Subordinate Court, and mutation in favour of the wife followed Lalta Prasad was a creditor He did not believe in the genuineness of these proceedings and commenced a suit for a declaration that they were in fraud of creditors; and, on the 6th of May, 1897, obtained a decree On the 20th of November, 1897, the husband and wife joined in a mortgage to Lalta Prasad, and again on the 14th of June they executed a simple mortgage for Rs. 3,000 in favour of Darbari Lal, the present plaintiff. On the 10th of August, 1899, they executed a second mortgage in favour of Lalta Prasad. Khurshed Ali Mian died in 1905. and in October, 1906, a considerable sum of money being outstanding, Rani Barkat-un-nissa became surety and paid off all the moneys due under the three

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mortgages with the exception of Rs. 12,500 due to Lalta Prasad, and Rs 1,500 due to Darbari Lal. The mortgage in suit was created to pay off these two sums

Two points arise in this appeal. If we are of opinion that as between Khurshed Ali Mian and Latif-un-nissa the latter was the owner of the entire property by virtue of the decree of the 18th of August, 1896, collusive though it was, then the plaintiff is entitled to succeed as against the only two respondents who are appealing They are, respectively, Musammat Hasina Begam and Musammat Farmudi Begam The appellants assert that this statement is a correct representation of the law and, further, that the two appellant daughters cannot question the validity of the decree passed in favour of their mother against their father. We are of opinion that both these points are well founded, and we have been guided to that decision by the principles laid down in the case of *Chenvirappa* v *Puttapa* (1). We are of opinion that once Khurshed Ali Mian permitted a decree to pass against him, in so far as he and his representatives were concerned, he was not thereafter able, as against his wife, to assert the invalidity of such decree. That decree was, however, open to be impeached by a creditor, and it was, as we have said, in fact successfully impeached In our opinion the legal effect of the decree was, as between husband and wife, to invest in the wife the property mentioned in the award, and in the terms of the award. It follows from that that she had a right to execute the mortgage in suit in the year 1913. We are, therefore, of opinion that on this point the appeal succeeds.

Now as regards the position of Rani Barkat-un-nissa, it is unfortunate that she is not represented in

(1) (1887) I L R , 11 Bom , 708.

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this appeal. But even if she were, we are of opinion that no authority could have been cited to us which would support the decision of the Subordinate Judge, or destroy the contention of the plaintiffs that in the circumstances of the case their mortgage is entitled to priority The point is a very short one. Musammat Barkat-un-nissa in the year 1906 stood surety. She thereby acquired certain well-known rights. One of such rights, incidental to the position of a surety, is that if the surety is called upon to pay the principal's debt and does in fact pay the whole of it, the surety is entitled to step into the shoes of the creditor, and to have for his own benefit any rights which the creditor happens to have against the debtor. Section 140 of Act No. IX of 1872 makes it perfectly clear that these rights accrue to a surety when the surety has done "all" that he was liable to do Now in this case it is conceded that Rani Barkat-un-nissa did not pay the whole of the indebtedness that existed between the creditor and the principal debtor, but a part only, and, therefore, she was nothing more than a creditor having a claim upon the principal debtor. She acquired none of the rights of either Lalta Prasad or Darbari Lal under any of the documents in question. Therefore the plaintiffs' rights acquired by them under the mortgage of the 16th of January, 1913, took, in our opinion, priority over the claims of Rani Barkat-un-nissa. In this respect also we think the appeal succeeds.

We, therefore, modify the decree of the lower court and decree the claim as prayed. We give to the plaintiff the costs of the appeal in so far as they relate to the issues raised by the respondents Nos. 5 and 8.

Appeal allowed.

Before Mr. Justice Mukerji and Mr. Justice Ashworth

TAMIZ BANO (DEFENDANT) *v.* NAND KISHORE AND ANOTHER (PLAINTIFFS).* 1927 *February*, 23.

Civil Procedure Code, section 2 (2) and section [illegible] by creditor of deceased against legal representative—Necessity for allegation that defendant is in possession of assets of deceased—Payment of debts by legal representative—Right of preference and retainer.

In a suit on a bond against the widow and sons of the deceased executant, the widow defended the suit and pleaded that her dower debt was Rs 25,000 and that the remaining heirs of her husband had sold his property to her in lieu thereof. The trial court found that no dower debt had been proved, and decreed the suit, and the lower appellate court found that no dower debt of a specific amount had been proved, and dismissed the appeal.

Held, on second appeal that the suit was rightly dismissed:

Per MUKERJI, J.,—because a decree could be had against the legal representatives of a deceased debtor whether they had any assets of the deceased in their hands or not. How the decree, when obtained, was to be executed was a matter to be ascertained thereafter *Girdharlal Krishnavallabh* v. *Bai Shiv* (1) and *Lallu Bhagwan* v. *Tribhuvan Motiram* (2), referred to.

Per ASHWORTH, J.,—because although when a defendant is sued in a representative capacity it is open to him to prove that he had fully administered the estate and there were no assets left to proceed against, and in the course of administration, as was alleged in the present case, it was open to him to give preference to his own debt, and, therefore, the existence of a dower debt and its amount and its satisfaction in the manner pleaded were material questions for decision, yet as the lower appellate court had found that the specific amount of the dower had not been proved, the suit

* Second Appeal No 1571 of 1924, from a decree of Har Gobind Bajel, Additional Subordinate Judge of Meerut, dated the 26th of October, 1924, confirming a decree of Dayanand Joshi, Munsif of Hapur, dated the 29th of May, 1924.

(1) (1884) I L R, 8 Bom, 309 (2) (1859) I L R, 13 Bom, 65.

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must be dismissed *Seth Kastur Chand* v. *Mangal Sen* (1), *Haji Saboo Sidick* v. *Ally Mahommed* (2), *Veerasekkaraju* v. *Papiah* (3) and *Oxenham* v *Clapp* (4), referred to.

THE facts of this case sufficiently appear from either of the judgements.

Mr. *S. Muhammad Husain*, for the appellant.

Munshi *Kailas Chandra Mital*, for the respondents.

MUKERJI, J. —The facts involved in this appeal are briefly these. A certain person, Abdul Qayum, whose heirs-at-law the defendants are, borrowed, on a bond, on the 16th of March, 1921, a sum of Rs. 300 from the plaintiffs He having died before the institution of the suit it was filed against his heirs Among the heirs was the original appellant to this court, Musammat Tamiz Bano, who was a widow of the deceased and is since dead. She denied the execution of the bond by her late husband and said that, on the death of her husband Abdul Qayum, her dower of Rs 25,000 was due to her and that consequently the remaining heirs of Abdul Qayum sold his property to her in lieu of her dower She did not say exactly what the effect of her defence was, but clearly she contemplated that the suit could not be maintained as no property of Abdul Qayum was left in the possession of his heirs.

The other defendants did not contest the suit.

The Munsif decreed the suit. He did not come to any very definite finding as to the allegation of sale in lieu of dower. He said:

"I am not inclined to hold that the debt of Rs. 25,000 had been proved There is nothing to prevent the plaintiff from proceeding against the property at present in the hands of the contending defendants as assets of Abdul Qayum."

(1) (1895) Punjab Record, p 337
(2) (1904) 6 Bom , L R , 1195.
(3) (1902) I L.R , 26 Mad , 792
(4) (1581) 2 B and Ad. 309

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On appeal the learned Subordinate Judge doubted that the transfer was really a genuine transaction, but he said that he was not going to decide what was Musammat Tamiz Bano's dower and he dismissed the appeal.

In this Court it is said that the lower appellate court should have come to a clear decision as regards the alleged transfer in lieu of dower and that no decree could be passed against the original appellant. Musammat Tamiz Bano, so long as it was not proved that she was in possession of any asset of her husband. I might mention here that Musammat Tamiz Bano having died pending the appeal, some of the original defendants are now prosecuting the appeal as her heirs.

Wallers, J

It appears to me that the question whether the legal representatives of a deceased debtor are or are not in possession of any asset of the deceased need not be tried at the present stage of the litigation. When a deceased debtor dies a suit has to be brought against his legal representative For this proposition no authority need be quoted The expression "legal representative" has now been defined in the Code of Civil Procedure in section 2, clause (11), as follows —

"Legal representative means a person who represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."

It will be noticed that where a party is sued in a representative character the legal representative is the person on whom the estate devolves It is not necessary for his character as legal representative that he should be in possession of any property of the deceased All that is necessary is that he should be a person on whom the estate would devolve It is

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Mukerji, J

only when a third party intermeddles with the estate of a deceased person that he can be treated as a legal representative and it is then alone that the question of possession arises. In this view it was not necessary for the plaintiffs to say, as they did in paragraph 2 of the plaint, that the defendants Nos 1 to 5 were in possession of any property left by the deceased Abdul Qayum.

The same conclusion may be drawn from an examination of section 52 of the Code of Civil Procedure. That section says that where a decree is passed against a party as the legal representative of a deceased person and the decree is for payment of money out of the property of the deceased it may be executed by attachment and sale of any such property Further, it says, where no such property *remains* in the possession of the judgement-debtor and he fails to satisfy the court that he has duly applied such property, he would be liable to the extent of the property as to which he has failed to satisfy the court. The section shows that there may be a decree passed against the legal representative of a deceased person without showing that the deceased left any property and the legal representative got that property. A suit may be brought against the legal representative of a deceased person even after such person has duly applied the property he inherited and has, therefore, ceased to be further liable for payment of any debt. A creditor has a perfect right to obtain a decree for his debt and then to find out how he would realize it Till he has obtained his decree he cannot seek any remedy to enforce payment His remedy to enforce a decree for money is indicated by section 52. That remedy is by attachment and sale of an asset of the deceased debtor. When an application for attachment is made it is open to the legal representative to

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prove either that the property sought to be attached is not the property of the deceased or that he has sufficiently accounted for such property of the deceased as came into his possession. But in any case till a decree has been obtained by the creditor, he has no remedy. The same view was taken in *Girdharlal Krishnavalabh* v. *Bai Shiv* (1) and *Lallu Bhagcan* v *Tribhuvan Motiram* (2). under the Code of Civil Procedure of 1882

In the circumstances I think the lower appellate court was right in not deciding the question of sale in lieu of dower The stage for any such decision has not arisen Even if there be no immovable property left, such as may be taken in execution of the decree, the plaintiffs, if they be armed with a decree, might seek out, in the course of twelve years within which they can execute the decree under the law, any movable property that may still be available. I am strongly of opinion that it is neither lawful nor expedient to throw out the suit altogether simply because one of the legal representatives alleges and seeks to prove that no assets are available.

In this view of the case the appeal must fail as no other point has been urged. I would dismiss the appeal with costs.

ASHWORTH, J. —I concur in the finding but not with the reasons of my learned brother. This second appeal arises out of a suit brought by the respondents against three persons, the present appellant, Musammat Tamiz Bano, widow of Abdul Qayum, and his two sons as legal representatives of Abdul Qayum, on a bond debt of Rs. 300. There was an allegation in the plaint that they were in possession of the property left by Abdul Qayum Only the widow defended the suit and her main plea, the only one with which we are concerned in this appeal, was that the

(1) (1884) I L R, 8 Bom, 309 (2) 1889) I L R, 13 Bom, 653

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Ashworth, J.

whole of the assets of Abdul Qayum were used by herself and the two other defendants to pay her dower debt.

Both the lower courts held that this disposal of the assets was designed to defeat the creditors including the plaintiffs. The trial court doubted the existence of any dower debt and the lower appellate court the existence of one of this magnitude. They decreed the suit against all three appellants as against "the assets of Abdul Qayum and at present in the hands of the widow defendant."

In this second appeal the pleas pressed are that the lower courts should have come to a clear finding as to the existence and amount of the dower debt and that the suit should have been dismissed if the dower debt exceeded the assets, since the defendants were entitled to use the assets for satisfaction of the dower debt.

The first question, therefore, to decide in this appeal is whether the defendants, as legal representatives of the deceased Abdul Qayum, were entitled to use his assets to pay the defendant widow her dower, if proved. There can, in my opinion, be no doubt that they were. In English law the widow would possess this right of retainer and the other two defendants this right of preference. The law is stated in Jenks' "Digest of English Law" (1st edition), paragraphs 2165 and 2166, pages 1378 and 1379 and supported by reference to numerous authorities. In Stephen's "Commentaries" (1st edition), volume II, pages 651 and 652, the right of retainer is based on the consideration

> "that a personal representative in his personal capacity could not sue himself at law in his representative capacity and that it would be hard that this difficulty should deprive him of the natural advantages of his position"

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The right of preference (pages 652 and 653 *ibid*) is said to have arisen thus :

" Inasmuch as any creditor of the deceased could sue the personal representative and get judgement from him unless the representative was in a position to plead *plene administravit* the only remedy of the representative at common law was to pay the debt and avoid further [illegible]

Walsh, J.

And if he could do that after action was brought was he bound to wait (if he was satisfied of the genuineness of the debt) until action was brought and costs incurred? Thus, it is said, the personal representative acquired his peculiar right, which is obviously liable to abuse and collusion. These considerations apply equally in India. Indeed the right of preference is the natural consequence of a legal representative possessing the privileges of the deceased and the right of retainer is only a form of the right of preference. I would refer to the following Indian cases in support of this view :—*Seth Kastur Chand* v. *Mangal Sen* (1) and *Haji Saboo Sidick* v. *Ally Mahommed* (2) and *Veerasokkaraju* v. *Papiah* (3) I hold, therefore, that legal representatives in the possession of assets (not being executors or administrators appointed by or subject to an administration order of a court) may show preference in the payment of debts and may retain a debt due to themselves With this view my learned brother agrees, I understand, although he considered that the question did not arise in the suit

The next question is whether by reason of such retainer and preference the defendants were entitled to resist the suit on the ground of *plene administravit* or, to use the language of section 52(2) of the Code of Civil Procedure, on the ground of having already duly applied such property of the deceased as is

(1) (1895) Punjab Record, p 337 (2) (1904) 6 Bom L R , 1135.
(3) (1902) I L R , 26 Mad , 792

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Tamworth, J

proved to have come into their possession. I have not been able to find any decision in India on the point. My learned brother would reply in the negative. It is not that he denies that the plea of *plene administravit* may be a good plea by which to resist execution against the assets in the hands of the defendants, but he thinks that this plea can only be raised in execution proceedings and not in a suit against a legal representative For this view he relies on the language of the definition of "legal representative" contained in section 2(11) of the Code of Civil Procedure, and on the provisions of section 52 of the Code They are as follows: Section 2(11).—

"*Legal representative*" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued."

Section 52—

"(1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property

(2) Where no such property remains in the possession of the judgement-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgement-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally."

His argument is that under the definition the legal representative of a party sued in a representative character is described as "the person on whom the estate devolves" without any such qualifying

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words as "unless he has duly applied the estate." No doubt a legal representative is such, irrespective of whether at the moment of suit he is in possession of or is likely to acquire any assets, and under order XXII, rule 4, he can be brought on the record. It does not follow that there is any right to a decree against every legal representative, or that he cannot plead due application of all the assets of the deceased. As to section 52 the argument appears to be as follows. The section provides for the plea of due application of the assets, i.e., of *plene administravit*, being taken in execution proceedings. Therefore it must be inferred that it cannot be taken at an earlier stage, namely, in the suit.

Ashworth, J.

In English law the plea of *plene administravit* could certainly be raised by a legal representative sued on a debt due from the deceased. In Jenks' "Digest of English Law" (1st edition), page 1369, paragraph 3253, it is stated:

"The liability of the personal representative, as such, to pay the debts on legacies of the deceased is *primâ facie* limited to the amount of the assets which he has received or which but for his wilful default he might have received. And a plea that he has fully administered the assets is, if proved, a defence to any claim by a creditor or a legatee. The liability of the heir, devisee or special occupant is similarly limited."

And in *Oxenham* v. *Clapp* (1) the plea of having fully administered was allowed even to an executor *de son tort*. Is this plea to be denied a legal representative in India merely on the ground that while section 52 of the Code of Civil Procedure specifically permits it to a legal representative in execution proceedings, there is no section of any Indian Act which either specifically or by implication provides for the plea being taken in the course of the suit on the debt? To hold this would be straining beyond

(1) (1831) 2 B. & Ad., 309

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all measure the maxim of *unius inclusio alterius exclusio est*. The fact that the plea of *plene administravit* can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree is no reason why it cannot be taken in the suit as a reason for no decree being passed. No doubt there is a presumption that a person who has come into the possession of any assets still has, or will have, assets to meet the claim, but this presumption arises from the burden of proving the contrary being on him as the person with special knowledge of the administration. But the presumption is one of fact and can be rebutted by evidence of due application of all the available assets Take the case of an executor who has wound up an estate after advertisement for claims Is a decree to be passed against him merely because he is the legal representative? -

Indeed it would appear that a person sued for a debt as legal representative can resist the suit either on the plea that as the deceased left no assets, he can have no legal representative (since the expression has reference to some estate and does not mean merely a relation who would have been the heir if any property had been left) or again on the plea that he has duly applied all the assets available or proved to be available

My conclusion then is that the lower courts were bound to decide the question whether the defendants had duly applied the assets that had come into their hands, and this required a decision as to the fact and amount of the dower debt.

Now I think that the trial court intended to find as a fact that there was no dower debt proved, and the lower appellate court that no dower debt of a

specific amount was proved, which comes to the same thing. This is a finding of fact by which we are bound in second appeal

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The suit was, therefore, rightly decreed, but as the defendants were held to have had assets and to have wrongly applied them, the decree should have been a *personal* decree against them, jointly and severally, as they all admit a share of the assets excluding the debt claimed. *Nathuram Siriji Sett* v. *Kutti Haji* (1) and *Mihi Lal* v *Babu Lal* (2). The decree as it stands is wrong as it restricts the plaintiffs to execution against the assets of Abdul Qayum; but as no appeal has been filed by the plaintiffs it must be deemed that they are satisfied with the decree against the assets I, therefore, concur in dismissing the appeal with costs.

BY THE COURT —The appeal is dismissed with costs

Appeal dismissed

Before Mr Justice Lindsay and Mr. Justice Sulaiman

JADUNANDAN RAI (PLAINTIFF) *v* BINDESHRI RAI AND ANOTHER (DEFENDANTS) *

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Act (Local) No XI of 1922 *(Agra Pre-emption Act), section* 12, *sub-section* (3)—*Pre-emption—Right based on relationship—Method of computation*

Held, on a construction of sub-section (3) of section 12 of the Agra Pre-emption Act, 1922, that a person who claims pre-emption by virtue of propinquity must not be more than four degrees removed from the ancestor common to himself and the vendor, counting that ancestor as the first degree. The measure of four degrees could not, on the language of sub-section (3), be applied to the relationship existing between the pre-emptor and the vendor.

*Second Appeal No 1509 of 1925, from a decree of Jogindro Nath Chaudhri, Subordinate Judge of Gorakhpur, dated the 30th of May, 1925, confirming a decree of Muhammad Zamir-ud din, Munsif of Bansgaon, dated the 16th of December, 1924

(1) (1897) I.L.R., 20 Mad., 446 (2) (1922) 77 Indian Cases, 809

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THE facts of this case sufficiently appear from the judgement of the Court.

Dr. *M Wali-ullah* and Munshi *Shiva Prasad Sinha*, for the appellant.

Babu *Piari Lal Banerji* and Pandit *Narmadeshwar Prasad Upadhiya*, for the respondents.

LINDSAY and SULAIMAN, JJ —The plaintiff is the appellant in this case and his suit for pre-emption has been dismissed. It is not denied that the plaintiff, Jadunandan, is related to the vendor, Musammat Sundra, for they are both descended from a common ancestor named Ram Dat.

The plaintiff's case, however, has failed in the courts below on the ground that he is more than four degrees removed from the common ancestor according to the rule which is laid down in section 12(3) of the Agra Pre-emption Act. A reference to the pedigree, which is set out in the judgement of the trial court, shows that the plaintiff is the great-great-grandson of Ram Dat and Musammat Sundra, the vendor, is the great-great-grand-daughter of Ram Dat

It is by no means easy to interpret sub-section (3) of section 12 of the Pre-emption Act But after giving the matter our best consideration, we are of opinion that in this case the plaintiff's claim for pre-emption must fail.

It appears to us that sub-section (3) of section 12 provides for a scheme of preference in favour of relations of the vendor, that is to say, those connected with him by descent from a common ancestor. Any relation who claims preference on this ground must, in the first place, show that he and the vendor are descended from a common ancestor

But all descendants from the common ancestor are not given a right of preference Under sub-section (3) the right is limited : it is provided clearly

that no one "removed by more than four degrees including the common ancestor" shall be entitled to pre-emption as against other persons of the same class. It seems to follow, therefore, from this that the right of preference on the basis of relationship consisting in descent from a common ancestor is strictly confined within the limits indicated and, therefore, any person who wishes to establish a right of preference under sub-section (3) must show that he is not further removed than four degrees from the common ancestor and in counting the degrees it is necessary that the common ancestor himself should be counted as the first degree. Ordinarily, perhaps, that would not be so, but we have to give effect to the words which we find in sub-section (3) "including the common ancestor" and, therefore, we think that in estimating the distance of four degrees the common ancestor himself is reckoned as the first degree Applying this principle to the pedigree now before us, the calculation works out as follows:—Ram Dat first degree, Mulho second degree, Purbhu Rai third degree, Musammat Phulehra fourth degree and Jadunandan plaintiff fifth degree. Jadunandan is, therefore, more than four degrees removed from Ram Dat according to the scheme of counting laid down in sub-section (3) of section 12.

It has been argued that the measure of four degrees mentioned in sub-section (3) of section 12 should be applied to the relationship between the vendor and the pre-emptor That argument was put forward in an earlier case heard by the Pre-emption Bench (1). It was held in that case that the measure of four degrees could not, on the language of sub-section (3), be applied to any relationship existing between the pre-emptor and the vendor; and obviously

(1) S. A No. 141 of 1925, decided on the 30th of June, 1926

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if that argument were accepted, the right of preference which sub-section (3) was intended to secure would be very much restricted. It is further to be noticed that in counting the degrees of relationship between the plaintiff pre-emptor and the vendor the common ancestor would necessarily be included and in that case there would have been no need for the words "including the common ancestor" which are to be found in sub-section (3).

The plaintiff, therefore, was not entitled to pre-emption and the appeal fails and is dismissed with costs.

Appeal dismissed.

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Before Mr Justice Mukerji and Mr Justice Ashworth.

KARAMAT ALI KHAN (PLAINTIFF) *v.* GANESHI LAL AND ANOTHER (DEFENDANTS) *

Mortgage—Usufructuary mortgage—Lease by mortgagee to mortgagor—Suit by mortgagee for arrears of rent—Res judicata—Civil Procedure Code, section 11.

A usufructuary mortgagee can undoubtedly lease the mortgaged property to a third party, and there is equally no reason why he should not lease it to the mortgagor. If he does so and thereafter sues the mortgagor for rent and obtains a decree, that decree will be a *res judicata* as to the subsistence of the relation of landlord and tenant between the parties. *Baghelin* v. *Mathura Prasad* (1) and *Altaf Ali Khan* v. *Lalta Prasad* (2), distinguished.

This was an appeal arising out of a suit for arrears of rent for the years 1328 to 1330F. under the following circumstances.

The defendants respondents are father and son. The defendant No. 1 as the father of two minor sons of his and the defendant No. 2 as an adult son mortgaged their zamindari property to the appellant's

* First Appeal No. 189 of 1924, from a decree of Mahendra Pal Singh, Assistant Collector, first class, of Muttra, dated the 15th of January, 1924.

(1) (1882) I.L.R., 4 All., 490. (2) (1897) I.L.R., 19 All., 496.

father, Kunwar Latafat Ali Khan. This was on the 10th of May, 1913. The defendants alone (without the minor sons of the defendant No. 1) executed on the same day, 10th of May, 1913, a counterpart of a lease (*qabuliat*) by which they purported to take over the mortgaged property under a lease and agreed to pay a certain amount of rent. Subsequently, on the 20th of September, 1915, the original mortgagors, father and sons, borrowed a further sum of money from the same mortgagee and gave a mortgage-deed. On the same day, the two defendants agreed by a document to pay enhanced rent, the amount added being the amount due as interest on the money subsequently borrowed. When the appellant brought his suit for arrears of rent, one of the pleas taken up was that the two transactions or rather the several transactions of mortgages and *qabuliats* formed a consolidated simple mortgage and the plaintiff's remedy was by a suit for recovery of interest or principal and interest, as the case might be, and not by a suit for arrears of rent.

The plaintiff put forward a plea that his father had previously obtained a decree for arrears of rent and that decree operated as *res judicata*. The learned Assistant Collector who heard the suit framed several issues and by a very short judgement decided that the several transactions formed a simple mortgage and that the *ex parte* decree could not operate as *res judicata*.

The plaintiff appealed to the High Court.

Munshi *Narain Prasad Asthana*, for the appellant.

Dr *Kailas Nath Katju* and Munshi *Panna Lal* for the respondents.

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The judgement of MUKERJI, J., after stating the facts as above, thus continued :—

In this Court it has been contended for the appellant that the defence was barred as *res judicata* and further, on the merits, the suit for arrears of rent should have succeeded

On the first point, it was argued on behalf of the respondents that the question of *res judicata* could be decided only after the appeal has been decided on the merits It was urged that, if the first suit was not cognizable by the revenue court the second suit was also not cognizable by the revenue court. In my opinion this contention is not right Both the suits were for arrears of rent and as such both were cognizable by the revenue court The defendants no doubt sought to get the suit dismissed on the plea that no relation of landlord and tenant subsisted between the parties. This was really a question of fact If it had been held in the first suit that no such relation existed, the suit would have been dismissed on that finding, but not because the suit, as brought, was not cognizable by the revenue court The *ex parte* judgement of the revenue court established that the relationship of landlord and tenant does exist between the present parties. In my opinion the former judgement does operate as *res judicata*

On the merits, too, I am of opinion that the appellant is entitled to succeed. I have already mentioned that the mortgagors and the lessees are not identical. The mortgagors included two minors while the lessees are only the adults among the mortgagors The mortgagee might very well have chosen particular persons out of the mortgagors as the persons to whom he would let out the property

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The second point to be noticed is that there is a right reserved by the mortgagee to eject the lessees in the case of a breach by them of any of the conditions of the lease. Thus, although, to start with, the lease and the mortgage were to be contemporaneous, it was open to the mortgagee to rescind the lease and to take over possession of the leased property in the case of a breach of any of the covenants contained in the lease

Verma, J.

The third point is that the mortgage-deeds do not contain any stipulation by which the mortgagee could recall his money If all the four transactions specified above formed but one simple mortgage, one would expect that the mortgagee would be entitled to ask for his money and interest. But no such provision has been pointed out. It is clear, therefore, that the mortgage was an usufructuary one and nothing but an usufructuary one That being so, the mortgagee was entitled to be in possession and it cannot be said that the lease was merely a method of recovering the interest and the lease should be treated as a part of the mortgage. There is nothing in the law which may prevent a usufructuary mortgagee from entering into any arrangement which might facilitate the recovery of what he might consider to be a reasonable return for his money. One of the methods usually adopted is the leasing out of the mortgaged property either to third parties or to the mortgagor himself

As regards the two cases quoted in the judgement of the court below, they were decided on the particular documents before the learned Judges and I do not propose to consider the terms of the documents considered there.

I would, therefore, allow the appeal, set aside the decree of the court below and remand the suit to

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it for decision on the merits. I would direct that the costs here and the costs in the court below should be costs in the cause.

ASHWORTH, J.—I concur in the above finding. I agree with the reasons for holding that a previous suit for arrears of rent operated as *res judicata* and debarred the respondents from pleading that the relationship in the present suit of landholder and tenant did not exist. As to the second plea that the suit was bad because in effect it was a suit by a mortgagee for interest and not a suit by a landholder for rent, it appears to me impossible to deny a usufructuary mortgagee the right to lease the mortgaged land to the mortgagor and by so doing to bring what under a simple mortgage would have been interest into the category of rent. He could lease to a third party and why not to the mortgagor? In the decisions relied upon by the lower court, *Baghelin* v. *Mathura Prasad* (1) and *Altaf Ali Khan* v. *Lalta Prasad* (2) the facts were different. There the mortgagee was given a right to realize under the mortgage the whole interest on the mortgage loan. He was also given the right to realize this interest as rent under a contemporaneous lease. The former provision was inconsistent with the latter, for it was inconsistent with the mortgagee being given a right of occupation which he could pass back to the mortgagor by a lease. There could not have been an intention that the mortgagee should at the same time have a right of occupation by the mortgagee in lieu of interest and a right to interest. There was thus an ambiguity in the mortgage-deeds which the courts avoided by ignoring the provisions as to occupation by the mortgagee, in view of the fact that the apparent right of occupation was contradicted by a stipulation in the form of a

(1) (1882) I.L.R., 4 All., 480 (2) (1897) I.L.R., 19 All., 496.

colourable lease that the mortgagor should continue in occupation. The deeds were, therefore, construed as simple mortgage-deeds. In the present case the right of the mortgagee to recover interest was confined to the contingency of the profits on the land realized by means of a lease to the mortgagor not reaching a certain amount. The mortgagee before claiming any interest under that mortgage would be bound to show that he had done everything that he could to realize profits up to the amounts stated. He would, thus, be bound to show that he had taken full advantage of the lease given to the mortgagor. In the present case, therefore, the mortgagee had not only a right to sue on the lease but was bound to do so. The decision referred to, if rightly construed, appears to me to be no authority for holding that a usufructuary mortgagee cannot at the time of mortgage (i.e., in the same transaction), lease to the mortgagor the land, occupation of which is being transferred to him (the mortgagee) under the mortgage, or for holding that, where the object of the lease is merely to facilitate collection of what would have been interest (and not rent) if the mortgage had not been usufructuary, the lease will be inoperative.

Ashworth, J.

BY THE COURT.—We allow the appeal, set aside the decree of the court below and remand the suit to it for disposal of the remaining issues. Costs here and hitherto will abide the result

Appeal allowed.

Before Mr Justice Ashworth and Mr Justice Iqbal Ahmad.

1927 *February*, 25.

SHAGUN CHAND AND ANOTHER (DEFENDANTS) *v* DATA RAM AND OTHERS (PLAINTIFFS) *

Civil Procedure Code, order I, rule 10(2)—*Mortgage—Partition of mortgaged property prior to preliminary decree—Parties added as defendants in application for final decree—Hindu law—Partition—Evidence of partition having taken place*

Pending a suit for sale on a mortgage, the mortgaged property was partitioned, but the preliminary decree was passed as against one defendant only. When, however, the plaintiffs came to apply for the final decree, they joined certain other persons, upon the ground that by reason of the partition they had obtained possession of portions of the mortgaged property since the passing of the preliminary decree But no formal application was made to add these persons as parties to the record.

Held, that it was not competent to the court to add (*per* ASHWORTH, J), or at any rate the court should not have added (*per* IQBAL AHMAD, J), the names of these persons to the array of parties, and their names should be struck off.

Held, also, by ASHWORTH, J, that the bringing of a suit for partition is only presumptive evidence of separation and that evidence may be rebutted by other evidence such as the fact of the withdrawal of the plaint on the ground that separation had not taken place or was not desired, but not by evidence merely of withdrawal of the plaint. *Palani Ammal* v *Muthuvenkatachala Monagar* (1), referred to.

THIS was a second appeal arising out of an application for the framing of a final decree in a mortgage suit. One Shyam Sundar Lal executed a mortgage-deed in favour of Lala Data Ram and Musammat Bundi, applicants for the final decree. They

* Second Appeal No 1806 of 1924, from a decree of Abdul Halim, Additional Judge of Meerut, dated the 15th of May, 1924, confirming a decree of Har Govind Bajel, Subordinate Judge of Muzaffarnagar, dated the 9th of October, 1923

(1) (1924) I L.R., 48 Mad., 254

obtained a decree against him. Subsequent to the institution of the suit, Shyam Sundar Lal purported to partition the mortgage property along with other property between himself and the present appellants. Data Ram and Musammat Bundi consequently only asked for and obtained a preliminary decree against Shyam Sundar Lal. In their application, however, for a final decree they joined the appellants on the ground that they had obtained possession under the partition deed. No application was made to the court under order I, rule 10(2), of the Code of Civil Procedure, for joining them as a party and no order was passed by the court under order I, rule 10(2), declaring that they were necessary parties and allowing their names to be joined as defendants.

The final decree was framed not only against Shyam Sundar Lal but also against the appellants Both the lower courts held that inasmuch as Shyam Sundar Lal, in the year 1914, long before the present litigation, had applied for partition of his share in some villages, he had indicated that he had become separate from the other members of the joint family They held that this was conclusive evidence of separation, notwithstanding that it was shown that he had withdrawn the suit for partition

The added defendants appealed to the High Court.

Dr *Kailas Nath Katju*, for the appellants

Babu *Piari Lal Banerji* and Munshi *Kailas Chandra Mital*, for the respondents.

The judgement of ASHWORTH, J., after stating the facts as above, thus continued —

In this appeal two points arise for decision The first point is whether the final decree was rightly

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Ashworth J

given against the appellants I am of the opinion that the proceedings for a final decree are merely a continuation of the suit as instituted for the purpose of a preliminary decree and that the provisions of order I, rule 10(2), of the Code of Civil Procedure, governing the joinder of an additional party during the pendency of a suit will apply to this case. As the sole question in the suit was whether the plaintiff was entitled to a decree against Shyam Sundar Lal in respect of his interest in the mortgaged property, neither the plaintiff nor the court (*suo motu*) could add the appellants at any time as defendants, still less could they add them as defendants after a preliminary decree excluding them had been passed. The court, therefore, in my opinion, had no jurisdiction to add these appellants as parties. Nor indeed did it do so The inclusion of their names as judgement-debtors under the final decree was not due to any order of the court for their names to be added as defendants, but merely due to the fact that the plaintiff had included their names in his application for a final decree It cannot be said that the mere fact of the court having included their names in the decree amounted to an order under order I, rule 10(2) I would, therefore, hold that no decree should have been granted against the appellants

The second point taken by the appellants is that if they were parties to the proceedings for a final decree they should have been given an opportunity of rebutting by evidence the presumption of separation arising out of Shyam Sundar Lal's plaint in the partition suit of 1914 According to the latest decision on the subject by the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagar* (1) the bringing

(1) (1924) I L R, 48 Mad., 254

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of a suit for partition is only presumptive evidence of separation and that evidence may be rebutted by other evidence, such as the fact of the withdrawal of the plaint on the ground that separation had not taken place or was not desired (but not merely by evidence of withdrawal of the plaint). This being so, it would have been necessary but for my finding on the first point to have remanded the case to give the appellants an opportunity to produce their further evidence. Having regard, however, to my finding that the appellants were improperly joined as judgement debtors in the decree, the order that I would pass is that the decree of the lower court should be modified so as to exclude their names. The remaining names will remain on the ground that the decree was rightly passed against defendants Nos. 1 and 2 and that the other defendants have not appealed.

IQBAL AHMAD, J.:—I agree in the order proposed, but I prefer to base my decision on grounds other than those assigned by my learned brother. It is apparent, from the facts stated in the judgement of my learned brother, that a partition was effected by the appellants and Shyam Sundar Lal, the mortgagor, during the pendency of the suit filed by the mortgagees on the basis of the mortgage-deed executed by Shyam Sundar Lal, and before the passing of the preliminary decree in favour of the mortgagees. The mortgagees decree-holders applied for a final decree, not only against the persons who were defendants to the suit as originally brought, but also against the present appellants, and certain other transferees from the mortgagor. The decree-holders asserted that the partition effected by Shyam Sundar Lal and the appellants was collusive and was made

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Iqbal Ahmad, J.

with a view to deprive them of their rights as mortgagees, and as such, could not affect their right to obtain a final decree with respect to property covered by the preliminary decree, and that in order to avoid future complication it was necessary, in the ends of justice, to bring the appellants on the record of the mortgage suit and to pass a final decree as against them as well. In view of the provisions of section 2 (2) of the Code of Civil Procedure it cannot be doubted that the mortgage suit filed by the mortgagees was continuing when the application for the preparation of the final decree was made by them That being so, I am not prepared to hold that under no circumstances has the court jurisdiction, after the passing of the preliminary decree and before the final decree has been passed, to implead as defendants to the suit persons who were not originally impleaded as defendants and were not parties to the preliminary decree But the question whether or not persons who were not originally made defendants, should be made defendants in the suit is a question entirely within the discretion of the court, as is apparent by the provisions of order I, rule 10(2), of the Code of Civil Procedure. Having regard to the complicated nature of the questions that arise for consideration in this case, because of the respective allegations of the parties as regards the jointness or separation of Shyam Sundar Lal and the appellants, and as regards the collusive nature or otherwise of the partition effected during the pendency of the mortgage suit, it appears to me that the trial court should have, in the exercise of its judicial discretion, refused to bring upon the record the appellants before us. Moreover, as pointed out by my learned brother, evidence that the appellants wanted to lead has been shut out by the court of first instance. For the reasons given above

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it appears to me that, in the circumstances of the present case, the applicant should not have been allowed to implead the appellants as parties to the mortgage suit after the passing of the preliminary decree and the question arising between the parties should have been left to be determined either in execution proceedings or by means of a separate suit.

BY THE COURT.—It is ordered that the appeal be allowed with costs to the appellants in both courts against the applicants in the court below and that the names of the appellants be removed from the array of judgement-debtors under the decree.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Boys and Mr. Justice Kendall.

V. E. SMITH (DEFENDANT) v. THE INDIAN TEXTILE COMPANY (PLAINTIFF).*

1927 February, 25.

Jurisdiction—British-Indian Courts—Foreigners temporarily resident in British India not excepted from the jurisdiction.

The Code of Civil Procedure extends to the whole of British India and there is no limitation in it or in any other Act in force in India excepting foreigners from the jurisdiction of British-Indian Courts. *Gurdyal Singh* v. *Raja of Faridkot* (1), referred to.

THE plaintiff in this case filed a suit in the Court of Small Causes at Benares on the allegation that, in pursuance of a conversation with Mr. Smith, defendant No. 1, and on assurances given by him, he had supplied certain goods to Mr. Smith and to the second defendant, Mr. Roche; that later Mr. Smith

* Civil Revision No. 92 of 1926.

(1) (1894) I.L.R., 22 Calc., 222.

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discharged all his own personal obligation in regard to the goods supplied to him but that the second defendant, Mr Roche, had, while retaining some of the goods supplied to him, defaulted in regard to the payment therefor The plaintiff, therefore, sued both the defendants and obtained a decree against them both, against the second defendant as principal and against the first defendant as surety. Mr. Smith is a resident of Ceylon and, for the purposes of British India, admittedly a foreigner He has also no property in this country. He filed a written statement in which he challenged the allegations of fact so far as they concerned him He also demurred to the jurisdiction of the court, alleging that the court had no jurisdiction whatever to deal with him. Beyond filing this written statement he took no further steps and did not appear, and, so far as he was concerned, the suit was decreed *ex parte* Mr Smith applied in revision to the High Court

Babu *G. Banerji*, for the applicant.

Munshi *Damodar Das*, for the opposite party

The judgement of the Court (BOYS and KENDALL, JJ.), after stating the facts as above, thus continued :—

The proposition as to the jurisdiction of the court would be somewhat startling if it were well-founded It would mean that, so far as the civil courts are concerned. any foreigner could walk into the country, could cheat anybody in the country and walk out again and continue to repeat the process as long as he pleased If that, however, was the law we should have to declare it. In support of this proposition we have had a ruling of their Lordships of the Privy Council and a passage from Dicey's " Conflict of Laws " drawn to our attention We do not think, however, that either of these authorities are of

any assistance to the present applicant. The decision of their Lordships is reported in *Gurdyal Singh* v. *Raja of Faridkot* (1). A decree had been obtained in the foreign State of Faridkot against a defendant who was not resident in Faridkot at the time the suit was filed, who was in another foreign State, Jhind, who had ignored the process of the Faridkot court, who made no appearance during the course of the suit, and had in no way submitted to the jurisdiction of the Faridkot court. Subsequently the plaintiff brought a suit against this defendant in a court of the Punjab. Their Lordships of the Privy Council held that when the foreign judgement of the Faridkot court was put in evidence in the Punjab court, it was for the British-Indian court to consider whether the Faridkot court's judgement had been passed with jurisdiction. Their Lordships held that the Faridkot court had no jurisdiction, that is to say, they held that a foreign court had no jurisdiction. That is a wholly different proposition from that in the present case. We are not concerned with the judgement of a foreign court nor the extra-territorial effect (a question of foreign law) of the judgement of a British-Indian court, but the intra-territorial effect of the judgement of a British-Indian court. We, a superior Court in British India, are asked to hold that a subordinate court in British India had no jurisdiction. That question must depend for its answer on what is the jurisdiction given to the British-Indian courts by the Legislatures of this country. The distinction is expressly recognized in their Lordships' judgement at page 238, where they say :—

" In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a

(1) (1894) I.L.R., 22 Calc., 222.

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Foreign court, to the jurisdiction of which the defendant has not in any way submitted himself, is by International Law an absolute nullity He is under no obligation of any kind to obey it and it must be regarded as a mere nullity by the courts of every nation, *except (when authorized by special local legislation) in the country of the forum by which it was pronounced* "

The "causes of jurisdiction," to which reference is made as being non-existent in the particular case, are referred to in a preceding passage which runs —

> "*It exists* always as to land within the territory, and it may be exercised over movables within the territory and in questions of status or succession governed by domicile, it may exist as to persons domiciled, or who when living were domiciled, within the territory "

Those causes of jurisdiction are equally absent in the present case. But there is an exception expressly made at the end of the passage first quoted :

> except (when authorized by special local legislation) in the country of the forum by which it was pronounced "

This is sufficient to indicate, as might be expected, that their Lordships expressly excepted the case of a court considering a decree passed by another court in the same country. The latter is what we have to do here We are not considering a foreign judgement but whether a court in this country had jurisdiction, and we have, as indicated by their Lordships, merely to consider the effect of the special local legislation.

The passage quoted to us from Dicey's "Conflict of Laws" (2nd edition), page 374, rule 84, has similarly no application There also the question being dealt with is what view is a country to take of a foreign judgement It is clear from the rule itself and from the comments and illustrations which follow

that that is the question which was under consideration.

We have then only to consider the effect of the legislation affecting British India. It is, of course, clear that the Code of Civil Procedure extends to the whole of British India. Counsel for the applicant in revision has not been able to direct our attention to any limitation in the Code of Civil Procedure or in any other Act in force in this country excepting foreigners from the jurisdiction of British-Indian courts. Nor are we aware of any such limitation. That being so, there is nothing which will protect a foreigner from being subject to the courts of British India in a suit of the description before us. We hold that the court at Benares had jurisdiction to pass the decree which it passed against Mr Smith.

It is unnecessary then to consider whether Mr Smith submitted to the jurisdiction by accepting the process, appointing a pleader and filing a written statement, or, if he did so submit, what would be the effect thereof.

The application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr Justice Ashworth and Mr Justice Iqbal Ahmad.

1927 *February*, 28. GADDAR MAL (PLAINTIFF) *v* THE TATA INDUSTRIAL BANK, LIMITED, BOMBAY (DEFENDANT) *

Act No IX of 1872 *(Indian Contract Act), sections* 7, 8 *and* 9—*Banker and customer—Enhancement of rate of interest charged on overdrafts—What amounts to notice to customer*

The mere sending of a notice by a bank to one of its customers that the interest charged on overdrafts against security held by the bank had been raised is not of itself sufficient to render the customer liable to pay the enhanced rate. But where, after receiving notice that the rate of interest has been raised, the customer borrows more money from the bank, the bank is justified in charging him interest at the enhanced rate

THE facts of this case were as follows —

This was a second appeal by the plaintiff arising out of a suit brought by the plaintiff against the Tata Industrial Bank, Limited, Bombay, defendant, for recovery of a balance alleged to be due under a contract arising out of overdrafts allowed by the Bank to the plaintiff from time to time, on security of a deposit with the Bank of 182 bales of cotton. The contract governing the suit was expressed in a letter of lien of the 5th of December, 1912, by the plaintiff in which it was agreed that the plaintiff on his part should deposit bales of cotton and obtain loans repayable upon demand from the defendant bank The loans were to bear interest at Rs 8-8-0 per cent. per annum and the Bank was to hold the cotton bales as security until directed by the plaintiff to sell them,

* Second Appeal No 1671 of 1924, from a decree of Raj Rajeshwar Sahai, Third Additional Subordinate Judge of Aligarh, dated the 4th of September, 1924, confirming a decree of Jagdishwar Nath Kaul, Munsif of Hathras, dated the 22nd of February, 1923

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in which case the Bank were entitled at time of settlement to recover the loans made, along with the interest and certain charges for insurance and storage Provision was made for variation of the rate of interest by agreement between the parties. On the 18th of March, 1922, the Bank informed the plaintiff by letter that they intended to charge Rs 9 instead of Rs. 8-8-0 from that date. and. again, on the 21st of April, 1922. they intimated their intention to raise the interest to Rs 10 To these two intimations the plaintiff made no reply It is to be noted that in all the plaintiff obtained Rs. 24,900. Out of this sum, one advance of Rs 3,400. made on the 8th of February, 1923. was subject not to both the letters of the 18th of March and 21st of April, 1922. raising the interest from Rs 8-8-0 to Rs 9 and Rs 10. The cotton was ultimately sold by the Bank under directions by the plaintiff and the plaintiff claimed that. on the 18th of February, 1922, when the sale was complete. there was a sum of Rs. 528-5-0 due to him out of the sale-price after deduction of insurance and storage costs, and after allowing interest to the Bank at Rs. 8-8-0 In his suit he ignored the fact of the Bank having raised the interest. The suit was resisted on the grounds that (*a*) the plaintiff had under-estimated the costs of storage and insurance and (*b*) that he was bound to allow the defendant the higher rate of interest from the dates of the letters of the Bank intimating their intention to charge the higher rates. With ground (*a*) there was no concern in this second appeal, as the decision on this issue was one of fact

The suit was dismissed by the court of first instance and this decree was affirmed by the lower appellate court. The plaintiff appealed to the High Court.

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Munshi *Panna Lal*, for the appellant

Dr *N. C Vaish*, for the respondent

The judgement of ASHWORTH, J., after stating the facts as above, thus continued :—

Both the lower courts have held that the plaintiff was bound to pay the higher rates of interest and have given the same reasons for so holding These reasons are set forth in the judgement of the trial court, in a manner approved by the lower appellate court, as follows .—

"*Issue* 2.—It is next contended by the plaintiff that the defendant is not entitled to claim the increased rate of interest at Rs. 9 per cent and 10 per cent per annum, for there was no subsequent agreement by the plaintiff to pay interest at the enhanced rate The stipulation contained in the agreement is that interest shall be charged at the rate of 8½ per cent. per annum or at such other rate as may be from time to time agreed upon. This shows that the Bank had reserved to itself the right to increase the rate of interest from time to time No customer would willingly and expressly agree to an enhancement of the rate that has once been stipulated, and we have, therefore, to look to the circumstances and see whether the plaintiff had accepted the increased rates Letters, dated the 18th of March, 1922, and the 21st of April, 1922, demanding the increased rates of 9 and 10 per cent. per annum, respectively, were duly sent and delivered to the plaintiff who did not take any objection If he was not prepared to accept the increased rates he ought to have protested and cleared his accounts with the Bank But the silence on the part of the plaintiff shows that there was an implied acceptance of the rate which the Bank had the power to increase It is well established law that acceptance can be made without express communication and the issue is, therefore, decided accordingly"

It does not seem to us to be correct to say that "the Bank had reserved to itself the right to increase the rate of interest from time to time" The loans by the Bank were payable on demand, but the Bank were entitled to retain the cotton as security, and in

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Isherwood, J.

the event of refusal of the plaintiff to pay on demand, to sell and to repay themselves out of the purchase money. If the plaintiff had refused to agree to the higher rates of interest the Bank would have had no right to charge them. All that it could have done would have been to close the account and, if the plaintiff failed to repay the balance due to the Bank, to realize from the bales. Indeed, that this was the meaning of the agreement seems to be accepted by both the lower courts, because they do not argue that from the date of the intimation of the higher rate the Bank was *ipso facto* entitled to the higher rates, but they both take up the position that the plaintiff's failure to intimate that he did not accept the offer to continue the loan under the higher rates, in the circumstances, amounted to conduct expressing acceptance of the offer of the Bank to continue the loan and make further loans, at the higher rates of interest

The law on the subject of acceptance of an offer is indicated in sections 7, 8 and 9 of the Indian Contract Act and these sections must be read without reference to the English law on the subject According to section 7, before a proposal becomes a promise rendering the promisee liable to the conditions contained in the promise, there must be an absolute and unqualified acceptance. This acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted If the proposal prescribes the manner and acceptance is not made in that manner, the promiser may require acceptance in the manner prescribed, but if he does not do so, he will be held to have accepted the acceptance in the manner that it was made In section 8 provision is made for an implied acceptance by performance on the part of the

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promisee of the conditions of a proposal or by the acceptance of any consideration offered for a reciprocal promise invited from the promisee In section 9 it is stated that the acceptance of any promise made in words is said to be "express" and made otherwise than in words is said to be "implied"

Ashworth, J.

In my opinion, a correct interpretation of the sections does not import into Indian law the English law as to acceptance by conduct On a proper interpretation of these sections there are only three cases in which acceptance can be made otherwise than in words One is when the promisor has specified a manner in which his proposal is to be accepted and that manner is not acceptance in words but acceptance otherwise than in words A second is when acceptance is by performance of a condition of the proposal and the third is when acceptance of proposal is by the acceptance of any consideration offered for a reciprocal promise invited from the promisee. There is, however, one further case in which there may be acceptance by conduct which is not covered by sections 7, 8 and 9 It is when trade or mercantile usage or local usage can be invoked to import into the transaction a promise by the promisee which is not made either expressly or impliedly For instance, there may be a recognized trade usage according to which a person borrowing from a bank or overdrawing is taken to contract to pay the bank rate of interest. It does not appear to me that English decisions as to acceptance by conduct can be invoked to extend the restrictions thus obtaining in India on the method of acceptance. Applying this law to the present case I may state that no mercantile or trade usage has been invoked by the Bank in this case.

We find that the Bank on the two dates, when they proposed higher rate of interest, in effect offered

to continue the loans and to make further loans (up to the value of the deposited cotton) on condition that the higher rates of interest were paid at the time of settlement There was clearly no express acceptance of this offer by the plaintiff. The Bank did not propose any method of acceptance otherwise than in words Nor again did the Bank specify any condition of the proposal to be performed by the plaintiff and consequently there was no performance of the conditions of the proposal. The sole question then is whether the plaintiff accepted any consideration offered for a reciprocal promise invited from him. The proposal as to raising the interest was in effect a proposal by the defendant Bank not to demand at once the money loaned and to loan further money (up to the value of the security) if the plaintiff agreed to pay the higher rates of interest at the time of settlement The proposal invited from the plaintiff a reciprocal promise to repay with the higher rate of interest at the time of settlement, and a further loan was offered as consideration for this reciprocal promise. The plaintiff did take a further loan. The plaintiff, therefore, did accept a consideration offered by the Bank. This offer of the Bank to lend a further sum cannot be separated off from its offer to continue (i.e., not to make immediate demand for) sums already advanced. It, therefore, appears to me that the Bank's offer to continue the loans and to make further loans on the basis of higher interest at the date of settlement was accepted by the plaintiff by reason of his taking a further sum subsequently to that offer.

If it had not been for this acceptance of a further loan, I should have held that there was no acceptance by the plaintiff of the higher rates of interest. Even if the Bank had intimated in the said

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letters that in the event of their not hearing from the plaintiff they would presume acceptance by the plaintiff of the higher rates of interest, this would not have justified the Bank in claiming that their offer had been accepted in the manner prescribed, for it is well established in law that the manner prescribed cannot be mere silence. Assent must be by express words or positive conduct. No duty is cast by the law upon the person to whom an offer is made to reply to that offer Consequently, an omission to reply will not constitute an illegal omission and, therefore, cannot fall within the definition of act as contained in the General Clauses Act, section 3 (2), Act X of 1897

The consequence is that I would uphold the finding of the lower courts but on a different ground to that expressed by them

IQBAL AHMAD, J —I agree.

BY THE COURT —The order of the Court is that the appeal shall stand dismissed with costs

Appeal dismissed

Before Mr. Justice Mukerji and Mr Justice Ashworth

1927 *February*, 28

LACHMAN DAS AND ANOTHER (DEFENDANTS) *v* RAM PRASAD (PLAINTIFF) AND RAM PRASAD AND OTHERS (DEFENDANTS)

Act No I of 1872 (*Indian Evidence Act*), *section* 92, *provisos* 1 *to* 3—*Admissibility of evidence—Sale-deed—Evidence to show parties' intention that no title would pass*

There is nothing in law to render invalid a sale of property by one person to another for the sole reason of giving that other person a right to register a mortgage-deed in respect of other property in a particular place

* First Appeal No 78 of 1924, from a decree of Rup Kishen Agha, Subordinate Judge of Budaun, dated the 6th of November, 1923

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Evidence that a sale-deed was not intended by the parties thereto to be operative for the purpose of passing title is inadmissible

So *held* by ASHWORTH, J.

Dictum in Ameer Ali and Woodroffe's "Commentary on the Indian Evidence Act, 1872," that "although evidence to vary the terms of an agreement is not admissible, yet evidence is admissible that there is not an agreement at all" criticized

THE facts of this case are fully stated in the judgement of MUKERJI, J.

Munshi *Shiva Prasad Sinha*, Munshi *Sarkar Bahadur Johri* and Munshi *Hanuman Prasad Agarwala*, for the appellants.

Dr. *M. L. Agarwala*, for the respondents

MUKERJI, J.:—This is an appeal by two defendants in a mortgage suit, brought by the respondent No. 1 under the following circumstances. Three persons, viz., Ram Prasad, son of Dhuman Mal, his wife Musammat Barfi Kunwar and the appellant Lachman Das executed the bond in suit for a consideration of Rs. 5,200 in favour of the respondent Ram Prasad, son of Gulzari Lal. The plaintiff sought to enforce the mortgage and made parties to it not only the mortgagors but also the transferees from them and one Radhe Shiam, a minor son of Ram Prasad, son of Dhuman Mal, and his wife Musammat Barfi.

The defence of Lachman Das was threefold, so far as we are concerned in this appeal. He said that the mortgage was not properly registered and was, therefore, not enforceable, that he received no consideration for the mortgage and that he executed it under undue influence. He further added that he had no interest in the property at the date of the mortgage and, therefore, the mortgage was not enforceable against the property mortgaged. The appellant No. 2, Musammat Nanhi, appears to be a transferee from Musammat Barfi and her appeal

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Mukerji, J.

before us repeats the same arguments which we shall presently notice, on behalf of Lachman Das.

It appears that one Kalyan Chand was the owner of a considerable amount of cash and movable property. He made a will in 1907 in favour of his wife Musammat Champa Kunwar and his daughter's son Lachman Das. He gave by this document a life-interest to Musammat Champa Kunwar and the remainder to Lachman Das. Kalyan Chand and Musammat Champa Kunwar had a daughter, Musammat Barfi besides Musammat Kotori, the mother of Lachman Das. Musammat Kotori predeceased her father. Musammat Barfi married Ram Prasad and this Ram Prasad is one of the mortgagors along with Musammat Barfi By an agreement of 1910, entered into at a date when Lachman Das was still a minor, Musammat Champa Kunwar, Lachman Das and Musammat Barfi agreed that the property in question should go to Musammat Barfi, and Lachman Das and Musammat Champa Kunwar should each receive an annuity. We need not consider this agreement, as I have already stated it is not binding on Lachman Das I may add that the property mortgaged was purchased by Musammat Champa Kunwar with the money she received from her husband under the will and that, therefore, this property partakes of the same character as the cash and movables bequeathed by Kalyan Chand.

The learned Subordinate Judge decreed the suit and we have to consider the several points raised in appeal

The first point urged is that the mortgage is invalid on the ground that its registration is invalid. It appears that Musammat Champa Kunwar purchased by a deed a certain *kothri* or room belonging to one Radhe Lal. In executing the mortgage-deed

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in favour of the respondent No. 1 this *kothri* or room was included as a property mortgaged. The room is situated in Bareilly, while the mortgaged property, which is a certain entire village, is situated in the district of Budaun. The argument for the appellants is that the room at Bareilly was purchased with the sole object of including it in the agreement of 1910 and the object was to give jurisdiction to the Sub-Registrar of Bareilly to register the deed. It being granted that the owner Radhe Lal transferred it by a registered deed in favour of Musammat Champa Kunwar, the title to the room did pass to Musammat Champa Kunwar notwithstanding anything that might have been in the mind of Radhe Lal as to the passing of title. The property in the eye of law belonged to Musammat Champa Kunwar and, therefore, Lachman Das had the same interest in the property as he had in the cash and movables bequeathed by his grandfather Assuming, therefore, that Lachman Das had a title to the village, he had also a title to the room mortgaged. It follows that the Sub-Registrar of Bareilly had jurisdiction to register the deed. In the case of *Biswanath Prasad v. Chandra Narayan Chowdhury* (1) the property described did exist, but the mortgagor had no interest in the property and, therefore, the parties to the transaction never wanted that the mortgage should attach to such property That case is clearly distinguishable from the case before us I hold that the registration is without any flaw

[The judgement then dealt with other points not material for this report and concluded as follows :—]

There is nothing in the appeal and it must fail

ASHWORTH, J :—I concur in all three findings I would like to add, however, in respect of the first point that there is nothing in law to render invalid

(1) (1921) I.L.R., 48 Calc., 509

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a sale of property by one person to another for the sole reason of giving that other person a right to register a mortgage-deed in respect of other property in a particular place The motive of purchase is immaterial and the only question is whether there was a valid sale. It is urged in this case that there is evidence to prove that the parties to the sale-deed of the room had no intention that ownership in the room should pass and in the absence of such intention there was no sale notwithstanding the execution of the sale-deed. Assuming, but not admitting, that there is such evidence, it is, in my opinion, inadmissible The appellant's counsel has referred to the following dictum in Woodroffe and Ameer Ali's well-known commentary on the Indian Evidence Act :—

> " Though evidence to vary the terms of an agreement in writing is not admissible, yet evidence that there is not an agreement at all is admissible "

In support of this dictum two English decisions are relied upon, namely, *Harris* v. *Rickett* (1) and *Pym* v *Campbell* (2) *Harris* v. *Rickett* is no authority for the dictum as stated. It is authority for the rule that where the whole of a contract is not contained in a written document, it may be *supplemented* by parol evidence of a *collateral* agreement Collateral means in effect " not inconsistent with the terms of the agreement in question." Proviso (1) of section 92 gives effect to this rule, or at least to so much of it as the Indian legislature desired to incorporate in the Indian Evidence Act. *Pym* v *Campbell* is authority for the rule that parol evidence is admissible to prove any collateral verbal agreement to the effect that a document apparently complete and operative on its face should be conditional upon, and

(1) (1859) 28 L J , Exch , 197 (2) (1856) 6 E & B , 370

not operate, *until the happening of a certain event*, which has not occurred. This rule is reproduced in proviso (3) of section 92 of the Evidence Act. They are no authority for holding that evidence in any shape can be admitted for the purpose of showing that there was no agreement at all, or, in other words, that a deed was meant to be inoperative. The dictum criticized, occurring as it does in a well-known commentary, has so often misled the courts that I have thought it desirable to show that it needs the qualifications expressed in provisos (1), (2) and (3) to section 92 of the Indian Evidence Act. These provisions are to be read independently of English decisions.

I hold, therefore, that the lower appellate court was right in holding that the fact of the sale of the room being only effected in order to render the mortgage-deed in suit registrable at a certain place does not affect the fact that the room was sold or the consequent legality of the registration of the mortgage-deed.

BY THE COURT.—The appeal is dismissed with costs and the cross-objection is allowed also with costs. The respondent No. 1 will have interest on the total sum of the principal and interest up to the date of payment at 6 per cent. per annum.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Dalal.

1927 February, 28.

THE MUNICIPAL BOARD OF BENARES (DEFENDANT) *v* SHAMBHU NATH (PLAINTIFF)*

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 16—Suit cognizable by a Court of Small Causes, but tried by a munsif—Question of jurisdiction raised in appeal.

An objection to the jurisdiction must be taken notice of by any court, however late it may be raised, if it happens that on the facts admitted or proved it is manifest that there is a defect of jurisdiction. *Ramlal Hargopal* v *Kishanchand* (1), followed

THE facts of this case are fully stated in the judgement of the Court

Dr *Kailas Nath Katju*, for the appellant

Babu *Piari Lal Banerji* and Munshi *Shiva Prasad Sinha*, for the respondent.

MEARS, C. J., and DALAL, J.:—On the 24th of March, 1925, one Shambhu Nath sued the Municipal Board of Benares and one Babu Chandra Bal for damages laid at Rs. 1,440 This amount was split into two sums of Rs 440 and Rs 1,000, Rs. 440 being the damages said to have been sustained by an order whereby a certain balcony over a footpath was ordered to be removed by the Municipal Board, and Rs. 1,000 were the damages claimed by the plaintiff in respect of alleged improper acts of the Municipal Board of Benares and by Babu Chandra Bal personally On the 24th of August, 1925, the plaintiff made an application by which he sought to be allowed to exempt Babu Chandra Bal against whom he had made allegations of wrong-doing. The Munsif, no doubt,

* Second Appeal No 1052 of 1926, from a decree of Raja Ram, Additional Subordinate Judge of Benares, dated the 22nd of February, 1926, confirming a decree of Niraj Nath Mukerji, City Munsif of Benares, dated the 20th of October, 1925

(1) (1925) I L R, 51 Calc, 261

accepted the application as an admission on the part of the plaintiff that the allegations against Chandra Bal were entirely groundless and allowed the application. The plaintiff also asked that his claim for Rs. 1,000 damages should be struck out and that was done; and thereupon from the moment that the amendment was made, the claim ceased to be a claim for Rs. 1,440 and became a claim for Rs 440. At this date, 24th of August, 1925, Babu Hanuman Prasad Varma was the presiding officer of the Small Cause Court at Benares with jurisdiction up to Rs. 500, and, in our opinion, it was the duty of the court as a necessary consequence of allowing the amendment at once to return the papers to the plaintiff with instructions to him to proceed in the Small Cause Court if he wished to continue the action in its then state. The result of the matter in the court of the Munsif was that the claim of Shambhu Nath was decreed for Rs 200. The Municipal Board appealed and we are told, although we have not gone into the matter, that the decision of the Additional Subordinate Judge seems to have been based upon the pleadings as they existed before the amendment. We do not know how that may be and it is not material for our decision today to discuss the question of either of the decisions arrived at by either court, because a point has been taken that the Munsif had no jurisdiction to enter upon the trial of this matter when once it had been reduced by amendment to a claim for Rs 440 Section 16 of the Provincial Small Cause Courts Act, 1887, has been read to us and the imperative nature of the terms of that section provides that a suit cognizable by a Court of Small Causes shall not be tried by any other court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable We think the objection of

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the Municipal Board at Benares a good one and that the objection to the jurisdiction which, we are informed today, according to Mr. *Piari Lal Banerji* is only an objection to the decision on appeal of the Additional Subordinate Judge, must nevertheless by us be regarded as a matter affecting the jurisdiction of the Munsif and the objection must be given weight to in both courts In the case of *Ramlal Hargopal* v. *Kishanchand* (1) there is a passage in the middle of page 372. which lays down that an objection to the jurisdiction must be taken notice of by any court, however late in the day it may be raised, if it happens that on the facts admitted or proved it is manifest that there is a defect of jurisdiction There was, in our opinion, a defect of jurisdiction from the 24th of August, 1925, and the Munsif having thereafter entertained the case, we sweep aside the decision of the Munsif and of the Additional Subordinate Judge and order that the plaint be returned to Babu Shambhu Nath for presentation to a proper court if he has not already had a sufficient amount of litigation about this matter The costs of all these proceedings will abide the result. If no suit is instituted within one month, the matter is to come in our list for decision as to the question of costs before allowing him any costs. And we shall require some explanation from the plaintiff as to the circumstances under which he made unfounded charges of fraud in the plaint as originally drawn

Appeal allowed.

(1) (1923) I L R., 51 Calc., 361 .372

Before Mr. Justice Lindsay and Mr. Justice Sulaiman

ABDUL GHAFUR AND OTHERS (DEFENDANTS) *v.* KAMAL-UD-DIN AND OTHERS (PLAINTIFFS) AND AZIZULLAH AND OTHERS (DEFENDANTS).* 1927 March, 1.

Act (Local) No. XI of 1922 (Agra Pre-emption Act), section 17, sub-sections (1) and (2)—"Finds"—Pre-emption—Question as to determination of price when disputed

The word "finds" as used in sub-section (1) of section 17 of the Agra Pre-emption Act, does not mean that the court must come to a definite conclusion that the ostensible price was not the actual price, but the meaning is that some evidence must be given by the plaintiff in order to raise a presumption that the ostensible price was not the price actually paid A presumption of this kind having been raised, the burden of proof then shifts to the vendee and he has to satisfy the court that the price shown in the deed was the price actually paid by him and if he fails to do so, then all the court can do is to enter into the evidence regarding the market-value of the property and pass a decree for pre-emption on payment of the market-value so found

THE facts of this case sufficiently appear from the judgement of the Court.

Munshi *Kamla Kant Varma* and Maulvi *Syed Majid Ali*, for the appellants.

Dr. *Kailas Nath Katju*, Mr. *Zafar Mehdi* and Maulvi *Haider Mehdi*, for the respondents.

LINDSAY and SULAIMAN, JJ.:—The question which is raised for decision in this second appeal is whether the plaintiffs pre-emptors were liable to pay Rs 8,750 for the property sought to be pre-empted or only Rs. 5,500 as found by the courts below

Ordinarily, the question as to the price which was paid for properties sought to be pre-empted is a question of fact, which cannot be considered in second

* Second Appeal No. 1778 of 1925, from a decree of D C Hunter, District Judge of Allahabad, dated the 15th of July, 1925, confirming a decree of Raja Ram, Subordinate Judge of Allahabad, dated the 22nd of December, 1924

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appeal. In this case, however, it is alleged that the law, as laid down in section 17 of the Agra Pre-emption Act, has been misapplied and that the judgement of the courts below cannot be accepted.

We think it advisable, therefore, in the first instance, to consider the provisions of section 17 above mentioned. It is not to be denied that the section is unfortunately worded and obscure. Sub-section (1) states that where in any suit on the basis of the sale, the court finds that the plaintiff has a right of pre-emption but that the ostensible price was not the actual price, it shall proceed to ascertain the actual price and shall pass a decree for pre-emption on payment of such price

Sub-section (2) lays down that in such a case the burden of proving the actual price shall lie on the vendee, and, in the absence of satisfactory proof, the court must proceed to ascertain the market-value of the property and to pass a decree for pre-emption on payment of the value so found.

If sub-section (1) of section 17 is literally interpreted, it is difficult to see how the provisions of sub-section (2) can be given effect to, for under sub-section (1) the court "finds" that the ostensible price was not the actual price and then proceeds to call upon the vendee to prove what the actual price was. If the court, for example, in a case where the ostensible price was not the price mentioned in the sale-deed, namely, Rs. 10,000, finds that this ostensible price was not the actual price, how is it possible for the vendee then to try and prove the case that the price mentioned in the sale-deed, i e., Rs 10,000, was the price actually paid? We think, therefore, that the word "finds" as used in sub-section (1) does not mean that the court must come to a definite conclusion that the ostensible price was not the actual price, but that the

meaning is that some evidence must be given by the plaintiff in order to raise a presumption that the ostensible price was not the price actually paid A presumption of this kind having been raised in favour of the plaintiff, the burden of proof then shifts to the vendee and he has to satisfy the court that the price shown in the deed was the price actually paid by him.

If he fails to satisfy the court, then all the court can do is to enter into the evidence regarding the market-value of the property and pass a decree for pre-emption on payment of the market-value so found.

In the present case the property which was sold consisted of two shares situated in a village called Jalalpurwari. According to what is stated in the plaint, these two shares amounted to 3 annas 7 pies and 15 karants, and in the plaint it was stated that the revenue payable in respect of this property was Rs 82 odd per annum

According to the sale-deed which is dated the 1st of April, 1924, the price which the vendees paid for these properties was Rs. 8,750. According to what is stated in the deed and in the endorsement, Rs. 500 had been paid as earnest money and it was represented that Rs. 8,250 were actually paid to the vendors in the presence of the Sub-Registrar

The plaintiffs came into court and stated that this price of Rs. 8,750 was wholly fictitious and that as a matter of fact the money which was paid to the vendors was Rs. 4,000 and no more. In paragraph 3 of the plaint it was stated that the market price of the property sought to be pre-empted does not exceed Rs. 4,000 and "as a matter of fact the property has been sold for that sum."

Before the trial began the plaintiffs' pleader was asked to elucidate the meaning of this plea and his

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statement was to the following effect —" Plaintiffs' pleader states that only Rs. 4,000 were paid before the Sub-Registrar The vendors counted the money before the Sub-Registrar and informed him that they had received Rs 8,250 There was a fraud on the Sub-Registrar "

We may now mention that no attempt was made to support the case thus stated by the plaintiffs' pleader The case for the defendants was that as a matter of fact the price was Rs. 8,750, namely, Rs 500 paid as earnest money before the execution of the deed and Rs 8,250 paid to the vendors in the presence of the registering officer.

The issue raised in the trial court relating to the price was issue No 5, " what is the sale-consideration?" The Subordinate Judge thought that the provisions of section 17, sub-section (2), applied. He was of opinion that the burden of proving the actual price was shifted to the vendees We do not think that the Subordinate Judge was wrong in laying the burden of proof upon the vendees, for it is clear from all the evidence on the record that the price alleged to be given in this particular instance was a very high price indeed

[The judgement then referred to certain evidence and proceeded.—]

The Subordinate Judge, then, having shifted the burden of proof on to the vendees, proceeds to dispose of their evidence with the remark that it is of no value and no reliance can be placed upon it He does not examine the evidence in any detail, nor criticize it, nor again does he make any reference to the fact that the statement of the purchasers is corroborated by a certificate of the Sub-Registrar in the registration endorsement. That endorsement is admissible under section 60 of the Registration Act for the purpose of

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proving the truth of the statement contained in it. All that the Subordinate Judge says is this :—" The defendants have examined one of themselves Abdul Ghafur, Khwaja Hasan and others, but the evidence of none of them is of any value and no reliance can be placed upon it."

He then proceeds to discuss certain documents which were produced by the parties—sale-deeds which were put forward for the purpose of showing what the rates of purchase are in this village. He does not seem to have drawn any definite conclusion from these documents. All he remarks is that from the deeds produced it appeared to him that the market price could not be more than Rs. 100 per pie, i e , about Rs 4,375 in respect of the share in dispute This, however, is not the value which the Subordinate Judge has placed upon the property. He relied upon the evidence of a witness named Ibad-ullah, who was called on behalf of the plaintiffs Ibad-ullah attested the sale-deed in suit and he made a variety of statements when examined as a witness The Subordinate Judge has fastened upon one of these statements which apparently he was prepared to accept. This statement was altogether inconsistent with other statements made by Ibad-ullah. Ibad-ullah at the conclusion of his evidence stated that the sale was settled for Rs. 5,500. This is the statement which the Subordinate Judge has accepted and consequently he came to the conclusion that the pre-emptors would have to pay Rs 5,500 It is to be noticed, therefore, that although the Subordinate Judge was of opinion that the vendees had not produced satisfactory proof of the actual price and although it was his duty under those circumstances to decide the case on the basis of the market-value, he has not given his decision on this latter basis, but has accepted the

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evidence of Ibad-ullah that Rs. 5,500 was the price arranged. The case came up in appeal before the District Judge. He refers, in the first instance, to the case which was presented to the trial court in the statement made by the plaintiffs' pleader and observes that no effort was made or indeed could have been made to support this case. The learned District Judge states that the Sub-Registrar's endorsement is in favour of the defendants' case and that there was also other evidence in the defendants' favour. He then goes on to point out that the first court had found Rs 5,500 to be the highest price, a price which gave an interest of one per cent. per annum on the capital invested The Judge also referred to certain evidence given by the defendants themselves showing that property in the neighbourhood sold at from 20 to 100 years' purchase of the profits. He goes on to say that it was contrary to common sense to suppose that property sells at these high rates, except under very extraordinary circumstances, and being of opinion that the defendants had made no attempt to explain what he calls "the amazing price," he upheld the order of the Subordinate Judge.

We have already discussed the construction to be placed on section 17 of the Act, and we think, in the circumstances indicated, it is now proper for us to examine the evidence for ourselves.

[That portion of the judgement which deals with the discussion of the evidence is omitted The judgement concluded as follows:—]

On a review of the whole of the evidence we are of opinion that there is no sufficient reason shown why the evidence put forward by the defendants in this case should not be accepted Plaintiffs in pre-emption suits are very apt to imagine that they can

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acquire property at what they are pleased to call the market rate It would be a mistake if pre-emptors were encouraged in the notion that they can compel vendors to accept any price they may choose to offer for property which is being sold. The true market price of ordinary property is not easily to be ascertained and we think that if it is shown, as we think that it was shown in the present case, that the money set out in the sale-deed has actually changed hands, the plaintiffs must pay that sum if they desire to get that property by pre-emption. We have already stated that the plaintiffs came into court with a case which they could not support and it is also shown now that they have succeeded on a case which was not put forward by them. They did not at any time plead that the actual price paid for the property was Rs. 5,500 On the contrary, they stated that it was Rs. 4,000 only. The result of all this is that we are prepared to hold that the plaintiffs have failed to sustain the burden of proof which was laid upon them, and we are of opinion that the courts below were wrong in giving a decree either on the basis of the market-value or on the basis of some actual price which was deposed to by a witness whose evidence was unworthy of belief. We may observe here that a rival pre-emption suit was brought by the defendants Nos. 7 to 11. We understand, however, that these people have dropped out and have failed to take advantage of the decree passed in their favour in the court of first instance.

We allow this appeal, set aside the decree of the court below and order a decree to be prepared for pre-emption on payment by the plaintiffs of Rs. 8,750. That money must be paid into court within three

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months from the date of this Court's decree If so paid the plaintiffs' claim will be decreed with costs in all courts. In case of default, the plaintiffs' suit will stand dismissed in all courts with costs

Appeal allowed

Before Mr Justice Lindsay and Mr Justice Sulaiman

DEO NARAIN SINGH (PLAINTIFF) *v* AJUDHIA PRASAD AND OTHERS (DEFENDANTS) *

1927 *March*, 1.

Act (Local) No XI of 1922 *(Agra Pre-emption Act), sections 19 and 20—Sale-deed executed by Hindu widow and reversioner—Suit for pre-emption by co-sharer—Subsequent gift by widow—" Indefeasible title "*

A Hindu widow joined with the nearest reversioner for the time being in executing a sale-deed of certain property belonging to her deceased husband's estate Whereupon a suit was brought to pre-empt the sale Pending this suit, the widow alone, without the concurrence of the reversioner, executed a gift of the property in question The plaintiff then filed a second suit, based on this second transaction, on the allegation that it was in reality a sale and not a gift

Held, that the second suit would not lie, as the gift was not pre-emptible; but that the first suit must be decreed, inasmuch as the gift by the widow did not confer an " indefeasible " interest within the meaning of section 20 of the Agra Pre-emption Act, 1922. *Naurang Rai* v *Ram Sumer Rai* (1), referred to

THESE were two appeals arising out of two suits for pre-emption brought in the following circumstances :—

On the 1st of May, 1923, Musammat Abharaji joined with one Ajudhia, her reversioner, in executing a sale-deed in favour of the defendants Nos. 2 to 4 and the predecessors of the defendants Nos. 3 to 7. The consideration shown in the sale-deed was a sum of

* Second Appeal No 1722 of 1925, from a decree of S M Said-ud-din, Additional Subordinate Judge of Allahabad, dated the 24th of July, 1925, confirming a decree of Brij Mohan Lal, Munsif of East Allahabad, dated the 18th of March, 1925

(1) (1926) A I R , All., 680

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Rs. 100. A suit to pre-empt the sale was brought by one Deo Narain Singh who alleged that the real consideration was only Rs. 25. He sought pre-emption of the sale on payment of this sum.

After this suit had been instituted the defendants vendees obtained from Musammat Abharaji alone a deed which purported to be a deed of gift, the value of the property being expressed to be Rs. 400. The plaintiff Deo Naram Singh instituted another suit to challenge this transaction. He alleged, in the first place, that it was a fictitious transaction entered into for the purpose of defeating his right of pre-emption in the other suit. He claimed in the alternative that, if the transaction was a real transaction, it was a transaction of sale and not of gift.

The trial court found that the transaction was a gift and not a sale and on this finding it dismissed the suit for pre-emption of the sale. This finding was confirmed in appeal by the lower appellate court The plaintiff appealed.

Munshi *Janaki Prasad*, for the appellant

Munshi *Haribans Sahai*, for the respondents.

The judgement of the Court (LINDSAY and SULAIMAN, JJ.), after stating the facts as above thus continued :—The point which is raised here in second appeal in both cases is that the plaintiff's right to claim pre-emption had not been defeated by reason of the transaction which was found by both courts to be a gift, and the ground taken is that the interest which was transferred by the deed of gift was not an indefeasible interest In this connexion section 20 of the Pre-emption Act is referred to.

The question then is whether by reason of this deed of gift the plaintiff, at the date on which the decree in the suit for pre-emption came to be passed, had a subsisting right of pre-emption (section 19). This right to pre-empt, as at the date of the sale and

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the date of the suit, was based upon his status as a co-sharer. That right, however, would disappear if before the decree was passed the vendees could set up an equal status as co-sharers in virtue of the interest acquired by them under the gift made in their favour by Musammat Abharaji.

The argument is that the vendees are not entitled to claim as co-sharers under the gift because the interest they have taken is not indefeasible. It certainly is not an indefeasible interest in the ordinary acceptation of that term and we are not prepared to hold that the term as used in section 20 of the Act has the restricted meaning sought to be attributed to it in argument, namely, an interest which cannot be defeated by a suit for pre-emption There appears to be nothing in the language of the Act to indicate that the word "indefeasible" is used in this limited sense It is true that this word is not to be found in section 19, but if a subsisting right of pre-emption can be defeated before decree by a vendee becoming a co-sharer and thus raising himself to the same level as the pre-emptor there seems to be no reason why the process by which the vendee attains this position should be different in the cases provided for by sections 19 and 20 respectively. If section 20 is held to apply to transactions prior to the date of suit, why should it be necessary for a vendee to acquire under this section an "indefeasible" interest, and not under section 19? It is the acquisition of the indefeasible interest which bars the suit under section 20. Could the acquisition of a lesser interest before the date of the decree prevent the passing of a decree because a subsisting right of pre-emption had been lost thereby? There seems to be no good reason for such a distinction. It would seem, therefore, that the Act contemplates that a vendee cannot acquire the status of a co-sharer unless the

interest he acquires before the date of the decree is "indefeasible." In the present case the vendees cannot make themselves out to be co-sharers, for they are claiming under a transaction of gift carried out by a Hindu widow, a transaction which may be defeated by the suit of the reversioner Ajudhia who, in the course of the present suit, has declared his intention not to be bound by the widow's act.

And it is further to be observed that even if it be assumed that the question as to whether this gift is binding upon the reversioner could be tried in the suits which were before the lower courts, there has been no decision that the gift is binding. As matters stand, therefore, the vendees have no indefeasible interest which entitles them to say that they are co-sharers equally with the plaintiff, with as good a right to retain the property sold to them as the plaintiff has to take it.

The question is certainly not free from difficulty. It may be that the intention of the Legislature was that the word "indefeasible" should be used in the narrower sense suggested above, but all we can say is that if such was the intention it is not carried out in the language of the Act as it stands. We may mention that in the course of the argument we were referred to a case decided by a Bench of this Court under order XLI, rule 11, of the Code of Civil Procedure, *Naurang Rai* v. *Ram Sumer Rai* (1). That was a case in which a widow had made a transfer A suit for pre-emption was brought during her lifetime and it was held that the interest acquired from her would, while she remained alive, at any rate, entitle the transferee to defeat a claim for pre-emption.

In the case with which we are dealing here the widow died while the suit for pre-emption was

(1) (1926) A I R, All, 689.

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pending and the reversioner has succeeded to the estate

The result, therefore, is that Second Appeal No. 1722 of 1925 must be allowed. It arises out of the suit brought to pre-empt the sale We note here that the court of first instance found that the consideration for the sale was a sum of Rs. 100 and not Rs. 25 as pleaded by the plaintiff. The lower appellate court has not come to any finding on this point, but the evidence is clearly in favour of the vendees and, moreover, the point is not pressed before us. We, therefore, allow Second Appeal No 1722 of 1925 and give the plaintiff a decree for pre-emption on payment into court of a sum of Rs. 100 within six weeks from the date of this Court's decree. If the money is deposited within the time limited the plaintiff's claim will be decreed with costs in all courts If the plaintiff fails to deposit the money within the time allowed then the suit will stand dismissed with costs in all courts.

As to Second Appeal No 1723 of 1925, on the finding of the court below that the transaction was a gift, it follows that it was not pre-emptible, and although we have found in the plaintiff's favour that the deed of gift does not confer an indefeasible interest upon the donees, nevertheless this appeal must stand dismissed, but without any order as to costs.

Before Mr. Justice Boys and Mr. Justice Kendall.

ABDULLAH AND ANOTHER (PLAINTIFFS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER (DEFENDANTS).* 1927 March 7.

Act No. II of 1912 (*Co-operative Societies Act*), *section* 42, *sub-section* (4) (*a*), *as amended by the United Provinces Co-operative Societies Amendment Act* (*III of* 1919), *section* 2—*Co-operative society—Liquidation—Act* (*Local*) *No III of* 1901 (*United Provinces Land Revenue Act*), *section* 233 (*m*).

Under the provisions of section 42 of the Co-operative Societies Act, 1912, as amended by the United Provinces Co-operative Societies Amendment Act, 1919, the Collector attached certain cattle as being the property of one *Z*, who was indebted to a co-operative bank then in liquidation Whereupon *A* and *S*, who claimed the cattle as their own, lodged an objection to the attachment, and, when this was dismissed, had the cattle released on the security of one *HL* *HL* was compelled to pay Rs 720 on account of *Z's* debt to the bank Subsequently *HL* and *A* and *S* filed the present suit against the Secretary of State for India in Council, the Liquidator and *Z*

Held, that the suit was barred by the provisions of section 233 (*m*) of the United Provinces Land Revenue Act, 1901. *Secretary of State* v *Mahadei* (1), followed. *Tulsi Kuar* v *Jageshar Prasad* (2), referred to

THE facts of this case are fully stated in the judgement of the Court.

Maulvi *Muhammad Abdul Aziz*, for the appellants

Mr. *G W. Dillon* and Munshi *Narain Prasad Ashthana*, for the respondents.

BOYS and KENDALL, JJ —This is a plaintiffs' appeal in a suit for refund of money realized from them by the sale of cattle A Co-operative Bank in

* Second Appeal No 897 of 1926, from a decree of Nadir Husain, Additional Subordinate Judge of Bulandshahr, dated the 17th of February, 1926, modifying a decree of Brij Nandan Lal, Additional Munsif of Khurja, dated the 15th of August, 1925

(1) (1896) I L R, 19 All, 127 (2) (1906) I L R, 28 All, 563

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Bulandshahr went into liquidation and a Liquidator was in due course appointed. He found that one Zahur was a debtor of the Bank Proceedings in such a case are governed by the Co-operative Societies Act of 1912. Section 42 of this Act has been amended for the purposes of these provinces by the United Provinces Act No III of 1919 which has added to section 42 a sub-section (4) (*a*) which reads as follows :—

" Any sum ordered under this section to be recovered as a contribution to the assets of the Society or as costs of liquidation may be recovered, on a requisition being made in this behalf to the Collector by the Registrar of Co-operative Societies, in the same manner as arrears of land revenue "

The Registrar of Co-operative Societies or the Liquidator on his behalf invited the Collector to attach certain animals—cattle and horses—as being the property of Zahur An attachment was accordingly effected. Abdullah and Sultan, the present appellants, lodged an objection before the Collector of Bulandshahr, claiming the animals to be their own. This was dismissed on the 29th of August, 1924. Subsequently, apparently in order to save the animals from injury in the custody in which they were, Abdullah and Sultan got them released on the security of one Hira Lal for Rs 750 Hira Lal had subsequently to pay Rs 720 in satisfaction of Zahur's debt. After an infructuous suit had been filed, which was allowed to be withdrawn with permission to file a fresh suit owing to the Secretary of State not having been made a party, the present suit was filed by Abdullah and Sultan and Hira, the surety, against the Secretary of State, the Liquidator and Zahur The first court dismissed the suit *in toto*. On appeal the learned Additional Subordinate Judge dismissed the appeal as regards the claim against the Secretary of State and the Liquidator, but decreed the appeal to the extent that he gave the plaintiffs a declaration

to the effect that they were entitled to recover Rs 720 from Zahur, defendant No. 3, on payment of the requisite court fees therefor. Against this decree Abdullah and Sultan have appealed, making the Secretary of State and the Liquidator respondents to the appeal. Zahur, defendant No. 3, has not filed any appeal. Both the lower courts have held that no civil suit would lie in a matter of this nature against the Secretary of State or the Liquidator.

We have cited the terms of sub-section (4) (*a*) of section 42 of the Co-operative Societies Act as amended in these provinces. According to that amendment any sum ordered to be recovered as a contribution, etc., may be recovered "in the same manner as arrears of land revenue." The section of the Land Revenue Act applicable is section 149. That enacts that the Collector may attach and sell the movable property of the defaulter and that such attachment and sale shall be made according to the law in force at the time being for the attachment and sale of movable property under the decree of the civil court.

The contention in this appeal has centred round the question whether the provisions of order XXI, rules 58 and 63, of the Code of Civil Procedure are applicable, in which case the remedy of the plaintiffs would be by bringing such a suit as that from which this appeal arises, or whether such a remedy is barred to them by the provisions of section 233 (*m*) of the Land Revenue Act, and their remedy, if any, was by appeal to the Commissioner under sections 210 and 211 of the Land Revenue Act from the order dismissing their objection.

We are unable to hold that the provisions of section 233 (*m*) do not forbid such a suit as the present. It is there clearly laid down that no persons shall

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institute any suit in a civil court with respect to "claims connected with or arising out of the collection of revenue (other than claims under section 183) or any process enforced on account of an arrear of revenue, *or on account of any sum which is by this or any other Act realizable as revenue.*" This is clearly a case in which a sum was being realized as revenue, and the claim is clearly connected with and arising out of that transaction. There is, therefore, nothing in the words of the section which would justify us in holding that it did not forbid a suit in a civil court in the circumstances of this case. We were referred for the appellants to section 183 which expressly provides for a civil suit in certain circumstances, and it was urged that if a civil suit could be brought by a person who had defaulted in payment of revenue, *a fortiori* it would be natural to expect that a suit in the present circumstances could be brought by a stranger who asserted that he had nothing whatever to do with the revenue or the payment thereof.

But this argument overlooks the fact that section 233 (*m*) expressly excepts suits under section 183 and the existence of that particular section emphasizes the intention of the Legislature to bar all other suits excepting suits under section 183.

A similar question came before this Court and is reported in *Secretary of State* v *Mahadei* (1). In that case their Lordships commented on the hardship which a person suffered who was, in circumstances such as the present, debarred from filing a civil suit but they held that the law was clear and that no other conclusion was possible. We ourselves are unable to find any adequate reasons for differing from this conclusion

We have noted above that the lower appellate court has given a declaratory decree to the plaintiffs

(1) (1896) I L R., 19 All., 127

as against Zahur, no doubt relying upon the decision in *Tulsa Kuar* v. *Jageshar Prasad* (1). Zahur has not appealed and we have not, therefore, had to consider this question.

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ABDUL AZIZ v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Before Mr Justice Boys and Mr Justice Kendall

BHAGWAN DAT SHASTRI AND ANOTHER (PLAINTIFFS) v. RAJA RAM (DEFENDANT) *

1927 March, 9

Act No IX of 1872 (*Indian Contract Act*), *section* 23—*Agreement opposed to public policy—Performance of* "*puja*" *for success of pending suit.*

Plaintiff and defendant entered into a contract by which the plaintiff undertook to perform some kind of "*puja*" (referred to as "*anushthan*") in order to cause defendant to be successful in a suit which he had before the courts: in the event of his success, the plaintiff was to get one-tenth of the decree money. The plaintiff (partially at any rate) carried out his part of the contract, and the defendant was successful in his suit.

Held, on suit to enforce payment of one-tenth of the decree money, that the agreement was contrary to public policy, as it was found that the intention of the parties was that the plaintiff should exercise some extraneous influence, unauthorized by law, on the mind of the court.

THE facts of this case are fully stated in the judgement of the Court.

Dr *M L Agarwala*, for the appellants.

Munshi *Haribans Sahai*, for the respondent.

BOYS and KENDALL, JJ.:—This second appeal arises from a somewhat peculiar suit. The plaintiff and the defendant had entered into a contract by which the plaintiff undertook to perform some kind of "*puja*" which is referred to as "*anushthan*"

* Second Appeal No 1910 of 1924, from a decree of W Y Madeley, Additional Judge of Moradabad, dated the 23rd of September, 1924, reversing a decree of Banwari Lal, Subordinate Judge of Bijnor at Moradabad, dated the 20th of March, 1923.

(1) (1906) I L R, 28 All, 583

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in order to cause the defendant to be successful in a suit which he had before the courts In the event of his success the plaintiff was to get one-tenth of the decree money The plaintiff (partially, at any rate) carried out his part of the contract and the defendant was successful in his suit. The plaintiff, therefore, brought the present suit to enforce the payment of one-tenth of the decree money. The trial court decreed the plaintiff's claim in part, but the lower appellate court dismissed the plaintiff's suit on the ground that the agreement entered into between the parties was contrary to public policy The question of whether this agreement was contrary to public policy is the only one that has been argued before us in second appeal. It has been argued on behalf of the plaintiff appellant that the grounds on which a suit is barred by public policy have been very strictly limited, and that it is unsafe to make any addition to the classes of suits that can be so barred It is urged that it cannot be against public policy to pray for success in a suit and that, in effect, this was what the plaintiff undertook to do on behalf of the defendant The finding of the court below is that the plaintiff undertook by prayer (*prarthana*) to bring extraneous influence to bear on the mind of the court trying the defendant's suit. We think that the circumstances of this case distinguish it from one in which one person should merely have undertaken to pray to a righteous deity for the success of another's suit, for in such a case the deity being righteous would be understood only to exercise an influence in a just cause. In the present case the intention of the parties evidently was that the plaintiff should exercise some influence unauthorized by law on the mind of the court, whether righteous or the reverse, and whether through any particular deity or not, at any rate with the object of bringing about the success of

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the defendant in those proceedings. We think that such an agreement must be held to be contrary to public policy. It is true that no similar case has been quoted to us from the Indian or English Courts to fortify our decision, but such a case as the present could not now occur in England and it may be doubted whether such a case has ever come before an English Court; nor have we been referred to a similar Indian case.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mukerji and Mr. Justice Ashworth.

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March, 10.

BAZ BAHADUR SINGH AND OTHERS (PLAINTIFFS) *v.* RAGHUBIR PRASAD AND OTHERS (DEFENDANTS).*

Act No. I of 1872 (*Indian Evidence Act*), *sections* 17 *to* 21, *and section* 115—*Mortgage—Suit for redemption—Admission in mortgage-deed as to amount of consideration received differing from endorsement made by Sub-Registrar.*

Where the question was as to the exact amount which it was necessary for the mortgagor to pay to redeem a usufructuary mortgage it was *held* that a statement contained in the mortgage-deed that the mortgagor had received a particular sum at the time of registration, could not be taken into account as against the endorsement of the Sub-Registrar that a different (and lesser) sum had been paid by the mortgagees.

THE facts of this case sufficiently appear from the judgement of MUKERJI, J.

Munshi *Sheo Dihal Sinha*, for the appellants.

Dr. *Surendra Nath Sen* and Munshi *Ajudhia Nath*, for the respondents.

MUKERJI, J. :—This is a plaintiffs' appeal arising out of a redemption suit. There was a mortgage executed by one Durga Singh in favour of three

* First Appeal No. 184 of 1924, from a decree of H. Beatty, Subordinate Judge of Mirzapur, dated the 15th of December, 1923.

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Mukerji, J.

persons, Gaya Prasad and two others, for a sum of Rs 5,700 on the 11th of January, 1877. The mortgage was a usufructuary one. The plaintiffs, who claimed to have received the property on foot of a will executed by Durga Singh, seek to redeem it on payment of a certain sum of money. The defendants are transferees of the original mortgagees. The question is what is the amount that has to be paid in order to effect redemption On behalf of the appellants it has been contended that the lower court should not have allowed the mortgagees a sum of Rs 122 and the interest thereon, a sum of Rs 20-12-0, on certain grounds We have to see whether the appellants are right.

It appears that one of the items that make up the sum of Rs 5,700, the total mortgage money, was a sum of Rs. 1,011 agreed to be paid by the mortgagees and to be received by the mortgagor, at the registration. Accordingly, in the mortgage-deed the mortgagor said as follows —

" Today I received a further sum of Rs. 1,011 in cash at the time of registration." The appellants' case was that out of this sum only Rs. 889 was paid before the Sub-Registrar and they contend that the balance of Rs 122 should have been deducted from the mortgage money along with interest On the one hand we have the statement of the mortgagor in the deed that he expected to receive a sum of money at the registration. On the other hand, we have got the certificate of the Sub-Registrar that only Rs. 889 was paid before him In the circumstances the Sub-Registrar's certificate should have, in my opinion, prevailed as against the statement of the mortgagor in the deed, which does not amount to even an admission, which is usually rebuttable.

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As regards interest, the mortgagees claimed it at the rate of 1 per cent. per mensem up to the date on which the mortgagor could redeem a prior mortgage and obtain possession of the mortgaged property. Interest at that rate has been allowed by the court below, and it is agreed by the learned counsel for the appellants that this interest ought to be allowed. It follows, therefore, that if we deduct the sum of Rs. 122 we must deduct the interest also which comes to Rs 20-12-0. I would, therefore, allow the appeal to the extent of Rs. 142-12-0 The amount payable to the mortgagees on redemption should be reduced by this sum.

There is a cross-objection that the court below should have allowed to the respondents a sum of Rs 740-3-9 over and above what it has allowed. No evidence was laid before us to substantiate this cross-objection. No evidence has been printed. The cross-objection, therefore, fails I would dismiss it also with costs

ASHWORTH, J. :—I concur, but it appears to me desirable, in view of the remarks of the District Judge in his judgement, to consider, in somewhat more detail, the question of the conclusiveness in a mortgage or sale-deed of an averment of receipt of consideration. In this case the mortgagor stated in the mortgage-deed —"Today I received a further sum of Rs 1,011 in cash at the time of registration." The Sub-Registrar's endorsement, however, states: —" The executant received Rs. 889 in cash at the time of registration " The District Judge has rightly considered that the recital by the mortgagor does not operate under the law of estoppel It may be mentioned that in English law the general rule appears to be that a person who is a party to a deed is estopped from denying its contents, but that to this

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general rule there is the exception that a receipt in a deed does not amount to an estoppel generally, either at law or in equity. See pages 49 and 50 of Cockle's "Cases and Statutes on Evidence" (4th edition). In India the law on the subject is contained in the Evidence Act, of which Act sections 17 to 21 treat of admissions and section 115 of estoppel. It has been declared in decisions of the Privy Council that section 115 is not exhaustive of the law of estoppel applicable to India. But it may safely be said that a recital of a receipt in a deed will not operate as an estoppel, under any application of the principle embodied in section 115 (as opposed to the actual terms of that section) because, as stated above, such recitals do not operate by way of estoppel in English law. We have, therefore, to view the recital merely in the light of an admission, and from this point of view the sections in the Evidence Act as to admissions must be deemed to be exhaustive. Now, an admission must be read as it stands and it is not permissible to take one part of an admission (as to a single fact or occurrence) and reject another part. In this case, the recital in the deed says that the mortgagor received a certain sum at the time of registration. It is not permissible to cut down this admission into a mere statement that he received it. Admissions are of no evidential value once they are proved untrue. This admission is proved untrue by the Sub-Registrar's endorsement that a lesser sum was paid at time of registration. The admission must, therefore, be rejected entirely and the District Judge was not correct in treating it as an admission that the money had been received, though at some other time than at the time of registration.

BY THE COURT.—The appeal is allowed in part and the decree of the court below is modified to this extent that the amount payable by the plaintiffs will

be reduced by the sum of Rs 142-12-0. A fresh redemption decree will be prepared in this Court Six months' time is allowed from this date for payment. The appellants will have their costs in proportion to their success and will pay costs in proportion to their failure. The cross-objection is dismissed with costs.

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RAJ BAHADUR SINGH v. LACHHMI PRASAD

Appeal allowed in part

MISCELLANEOUS CIVIL

Before Mr Justice Lindsay and Mr. Justice Sulaiman

RAJA SRI KRISHNA DUTT DUBE BAHADUR (PLAINTIFF) *v.* RAM ACHHAIBAR RAI AND OTHERS (DEFENDANTS) * 1927 March, 16

Act (Local) No III of 1926 (Agra Tenancy Act), section 254 —Reference to High Court by Board of Revenue—Reference not to be of an abstract point, but of a concrete case arising before the Board

Section 254 of the Agra Tenancy Act, 1926, does not contemplate the reference to the High Court of merely an abstract point of law, but the reference of a concrete case coming before the Board of Revenue in which the particular point upon which the Board desires to have the opinion of the High Court arises.

In this case the Bench had before it a letter from the Registrar of the Board of Revenue to the Registrar of the High Court which purported to be a reference to the High Court under the provisions of section 254 of the Agra Tenancy Act, 1926. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Narmadeshwar Prasad Upadhiya* and Munshi *Shambhu Nath Seth*, for the appellant.

* Miscellaneous Case No 35 of 1927

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RAJA SRI KRISHNA DUTT DUBE BAHADUR v. RAM ACHHAIBAR RAI

Munshi *Harnandan Prasad*, for the respondents.

LINDSAY and SULAIMAN, JJ.:—This case comes before us as a reference made by the Board of Revenue under the provisions of section 254 of the Agra Tenancy Act, Act No. III of 1926. The points referred for our opinion are set out in a letter addressed to the Registrar of this Court and signed by the Registrar of the Board of Revenue. It is stated in this letter that the members of the Board of Revenue desire the opinion of this Court on three questions of law which are specified Along with this reference a number of records have been sent which, so far as we are able to gather, are records of cases which the Board of Revenue has already decided

Looking at the terms of section 254 of the Tenancy Act above referred to, it appears to us that this section contemplates a reference to this Court by the Board of Revenue in connexion with some case which is actually pending before the Board We do not think that this section justifies any reference in order to obtain an opinion upon any question of law arising in a case which has already been decided by the Board of Revenue. In other words, we are not disposed to construe section 254 as giving authority for the Board of Revenue to refer to this Court abstract questions of law detached from any concrete case which may be pending before the Board for decision. We notice, however, that in the letter of the Registrar of the Board of Revenue it is stated in paragraph 4 that there are several cases now pending before the Board involving the first and second points of law which are referred to in the letter. If the Board of Revenue desires to have the opinion of this Court under the section in question, we think the

proper course is for one of these pending cases to be submitted to this Court together with a statement of the facts of the particular case and a statement of the conflicting opinions of the members who are dealing with it. A copy of this order should be sent to the Board of Revenue and the matter will be taken up again when the record of any case pending before the Board and involving the points of law referred to is submitted to us with a statement of the facts and a statement of the opinions of the members of the Board. We consider it essential to have the case presented to us in this way in order to enable us to issue notice to the parties who must be represented by counsel when the case comes up before this Court for disposal.

APPELLATE CIVIL.

Before Mr Justice Ashworth and Mr. Justice Kendall.

RIKHDEO TIWARI (PLAINTIFF) *v* SUKHDEO TIWARI AND OTHERS (DEFENDANTS) *

1927 *March*, 11.

Hindu law—Hindu widow—Alienation by widow—Question as to origin of widow's title—Adverse possession

On the death of one *ST*, *N*, who was the widow of a predeceased nephew of his, got possession of some of his property and remained in possession for more than twelve years. The widow and one of two grandsons having alienated some of this property, the other grandson sued to have the sale set aside.

Held, that *N* had acquired a title which was good not only against the reversioners to *ST*, but as against the reversioners to her husband's estate.

Lajwanti v *Safa Chand* (1), distinguished. *Varada Pillai* v *Jeevarathnammal* (2) and *Kali Charan* v. *Piari* (3), referred to

* Second Appeal No 1883 of 1924, from a decree of Zorawar Singh, Additional Subordinate Judge of Ghazipur, dated the 5th of September, 1924, confirming a decree of Kanhaiya Lal Nagar, Munsif of Muhammadabad, dated the 4th of April, 1923.

(1) (1924) I L R , 5 Lah , 192 (2) (1919) I L R , 43 Mad , 244.
(3) (1924) I L R , 46 All., 769

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RIKHDEO TIWARI v. SUKHDEO TIWARI

THIS was a second appeal arising out of a suit brought by one Rikhdeo Tiwari to have adjudged void a sale-deed, dated the 27th of May, 1912, executed by his grandmother Musammat Naulasi along with his elder brother Sukhdeo, who purported to execute it both on behalf of himself and of the plaintiff, a minor at the time. The suit was brought on the allegation that Musammat Naulasi's husband was Sita Ram, a son of Sheo Tiwari and that the property came down to Musammat Naulasi from Sheo Tiwari through Sita Ram. Both the courts below found that as a matter of fact Sheo Tiwari was not the father of Sita Ram but the uncle, and that Sita Ram predeceased Sheo Tiwari. They consequently found that when Sheo Tiwari died, Musammat Naulasi had no title to the property left by him and that her possession of the same must be held to be adverse to the reversioners of Sheo Tiwari. There was no direct evidence to show how Sukhdeo came to be associated in the sale-deed impugned, but it was suggested that he was merely joined at the instance of the transferee in order to preclude any possible claim, such as the present one, either by Sukhdeo himself or by Rikhdeo. Both the lower courts found that at the date of execution of the sale-deed which was impugned, Musammat Naulasi had acquired absolute title in the property sold by twelve years' adverse possession, and the suit was, accordingly, dismissed. The plaintiff appealed.

Pandit *Uma Shankar Bajpai*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

The judgement of the Court (ASHWORTH and KENDALL, JJ.), after stating the facts as above, thus continued —

In this second appeal we are asked to hold that the lower courts were wrong in deciding in favour of

accretion of title to Musammat Naulasi by reason of twelve years' adverse possession We are referred to the Privy Council decision in *Lajwanti* v *Safa Chand* (1) as authority for the view that a widow getting possession of property, which could have come to her husband lawfully in his lifetime as reversioner or heir, must be deemed to limit her claim to that of a Hindu widow We would distinguish this decision, as it has previously been distinguished, on the ground that in the Privy Council case, at the time when the widow entered into possession, she was entitled to the property as widow and it was only subsequently that the birth of a posthumous son made her liable to dispossession In the present case Musammat Naulasi was not entitled under any view to a Hindu widow's possession at the time when she obtained entry The Privy Council decision has been distinguished in the same way in other cases We would refer to *Varada Pillai* v *Jeevarathnammal* (2) and *Kali Charan* v *Piari* (3)

It has been urged that as a matter of fact there is evidence which will justify it being held that the widow limited her claim to a widow's estate The evidence relied upon is an entry in the *khewat* showing that her name was associated with that of her daughter and her daughter's sons (exclusive of the present plaintiff). The lower appellate court found that this evidence did not apply to the property in suit or property left by Sheo Tiwari It is quite conceivable that this entry was with reference to property left by her husband Sita Ram We are told that he left some such property.

For the above reasons we hold that the lower courts were right in holding that Musammat Naulasi acquired an absolute title in the property by adverse

(1) (1924) I L R , 5 Lah , 192 (2) (1919) I L R , 43 Mad , 244
(3) (1924) I L R , 46 All , 769

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possession and that this absolute title was acquired not only against the reversioners of Sheo Tiwari's estate but as against any reversioner to her husband Sita Ram's estate.

We dismiss this appeal with costs.

Appeal dismissed.

Before Mr Justice Lindsay and Mr Justice Sulaiman

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March, 15

MUHAMMAD ASKARI (PLAINTIFF) *v* RAHMAT-ULLAH AND OTHERS (DEFENDANTS) *

Muhammadan law—Pre-emption—Talab-i-ishtishhad—Second demand made to one only of several vendees—Previous notice of date of sale—Pre-emption of share of one of several vendees

Held, in a suit for pre-emption based on the Muhammadan law—(1) that the mere fact of a previous notice to the plaintiff pre-emptor that the property is going to be sold on a certain date cannot operate as an estoppel or deprive him of his right to claim pre-emption after the sale has actually taken place, (2) that where the sale is to several vendees jointly, the pre-emptor is not obliged to pre-empt the whole, but can pre-empt the share of any one of the vendees, (3) that if the first demand is made to all the vendees, but the second to one only, the plaintiff can only get a decree in respect of the share of that one vendee

Aliman Begam v *Ali Husain* (1), *Gunput Jha* v *Anund Singh Das* (2) and *Biri Beharee Singh* v *Durbaree Lal* (3), referred to

THIS was a suit for pre-emption. The claim was originally based both on an alleged custom as well as the Muhammadan law. The claim, so far as the

* First Appeal No 523 of 1923, from a decree of Jotı Sarup, Additional Subordinate Judge of Saharanpur, dated the 15th of September, 1923

(1) (1923) I L R, 45 All, 449 (2) (1848) S D A (Lower Provinces) 22

(3) (1850) S D A (Bengal) 585

custom is concerned, was later on given up. The plaintiff's case was that as the owner of Lal Kothi in Saharanpur situated in the same compound as Malik Hotel, the property sold, he was entitled to pre-empt the sale The property was sold ultimately under a sale-deed, dated the 22nd of March, 1923, ostensibly for Rs. 8,000. The plaintiff alleged that the real sale consideration was only Rs 5,220 Various defences were raised on behalf of the vendees They pleaded that the plaintiff had no right of pre-emption under the Muhammadan law, inasmuch as the defendants themselves were co-sharers in the mahal in which the property was situated and were on equal footing with the plaintiff They further pleaded that the property had in fact been sold on the 18th of March, 1923, at a public auction and the plaintiff having had full knowledge of it had refused to purchase the property It was also pleaded that no proper demands, as required by the Muhammadan law, were made by the plaintiff and the suit was, therefore, not maintainable The defendants stated that the true consideration was Rs. 8,000 as entered in the sale-deed.

The Subordinate Judge found that the plaintiff had a right of pre-emption as against the vendees. He further found that the true sale consideration was Rs. 5,220 and not Rs. 8,000 as entered in the sale-deed. But he held that the sale took place under a public auction on the 18th of March, 1923, and that the plaintiff did not offer any bids. He also found that no demands were made at all, and that, in any case, inasmuch as the second demand was made only to one of the vendees, it was not a proper and valid demand

The plaintiff appealed and the defendants filed a cross-objection as to costs. In the High Court the

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defendants admitted the finding of the court below that the real sale consideration was only Rs 5,220 and not Rs 8,000 It was, therefore, accepted that the consideration entered in the sale-deed was inflated.

Dr. *Surendra Nath Sen*, for the appellant

Maulvi *Mukhtar Ahmad*, for the respondents

The judgement of the Court (LINDSAY and SULAIMAN, JJ), after stating the facts as above, thus continued :—

There is some inconsistency in the judgement of the court below, inasmuch as the finding that there was a public auction-sale for Rs 8,000 does not tally with the finding that the true consideration was only Rs 5,220 There is no doubt that prior to the sale of this property public notices were issued intimating that an auction-sale would take place on the 18th of March, 1923, at 10 o'clock in the morning. Due notice was also given of this date to the plaintiff. The plaintiff's statement is that he went to the place on the date and at the time and waited for two hours, but no auction-sale at all took place. On the other hand, although it was not expressly alleged in the written statement, the defendants' oral evidence was that on that date the plaintiff was actually present and it was in his presence that the auction-sale took place but he made no bids The evidence of the defendants is that at that time there was a gathering of about 80 or 90 men and the auction proceedings took from one to two hours The premises were occupied by a Deputy Collector and in the same compound was the plaintiff's kothi which was rented to the Subordinate Judge Neither of these officers has been produced to prove that a public auction-sale took place on that date. The evidence as regards a

big public sale having taken place is not very satisfactory, but it may be assumed for the purposes of this appeal that a sale took place on the 18th of March, 1923 The learned Subordinate Judge, however, has not found definitely that the plaintiff was really present on that date, and we are satisfied that this fact is not established by the defendants' evidence. As stated above, there was no express allegation of the plaintiff's presence in the written statement, and the plaintiff's witnesses who have deposed to this are worthy of credit In the first place, their evidence has been utterly rejected by the court below when it arrived at the finding that the true consideration was not Rs 8,000 We, therefore, find it impossible to hold that the auction-sale actually took place in the presence of the plaintiff and that he failed to make any bid

The claim being under the Muhammadan law, the mere fact of a previous notice to the plaintiff that the property was going to be sold on the 18th of March, 1923, cannot operate as an estoppel or deprive him of his right to claim pre-emption after the sale has actually taken place. Had he been actually present at the time and not made the *talabs* there and then, the position might have been different As regards the question whether the plaintiff did in fact make the demands, there are certain circumstances to which the learned Subordinate Judge has not attached due weight The defendants' own witness, Rahmat Khan, admitted that the plaintiff was prepared to give up to Rs 5,000 or Rs. 5,250 for the property. Similarly, the defendants' witness, Sajan Kunwar, stated that on the 21st of March, before the execution of the sale-deed, the plaintiff stated that the property was worth Rs. 5,000 or Rs 5,250 and that he would not make any higher offer Even the defendant

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Rahmat-ullah stated that Muhammad Askari did not purchase the kothi on account of the price being high. In his opinion it was worth a smaller amount This defendant said that the plaintiff stated that it was not worth more than Rs. 5,000 or Rs 5,250. It is thus quite clear from the defendants' own evidence that the plaintiff was prepared to offer Rs. 5,220 for this property On the finding of the Subordinate Judge, which we must accept, the property was actually sold for a smaller amount, namely, Rs. 5,220. It is, therefore, quite reasonable to believe that the plaintiff must have been willing to purchase the property up to the amount mentioned above When, therefore, he came to know of the sale it is most likely that he would have made the demands promptly. Another circumstance to bear in mind is that the suit was brought in April, 1923, which is just after a month from the date of the execution of the sale-deed There is, therefore, every reason to believe that the demands were made

The next point urged was that the demands as proved by the plaintiff's witnesses were not made in accordance with the Muhammadan law The plaintiff Muhammad Askari as well as his witnesses, Ali Hasan and Muhammad Aslam Khan, prove conclusively the making of the first demand promptly as soon as the plaintiff came to hear of the sale from Ali Hasan. As regards the second demand the evidence of the plaintiff Muhammad Askari and his witness Muhammad Aslam Khan shows that the second demand was made in the presence of two witnesses to the vendee Rahmat-ullah, and a reference to the first demand was duly made. The evidence of Ali Hasan on this point is no doubt unsatisfactory. After several questions were put to him it was extracted from the witness that at the time of making

the second demand a reference to the first demand had been made In cross-examination, when he was asked to repeat what the plaintiff had stated on the occasion of the second demand, the witness omitted to mention this. In re-examination he again stated that there was such a reference. The learned Subordinate Judge in his judgement has thought that the witness was too thick-headed to realize the fact That may be so, but it does not disprove the other evidence of the plaintiff that at the time when the second demand was made a reference was made to the first demand We think that these formalities were duly complied with

The last point urged is that the demand made to only one of the three vendees was not sufficient According to the defendants' evidence the bid was made by Rahmat-ullah alone and it was he who made the cash payment. The sale-deed, however, is in favour of Rahmat-ullah and his two brothers, but there is no specification of their shares, though one may, in the absence of any evidence to the contrary, presume that they acquired the property in equal shares In fact Rahmat-ullah in his deposition stated that his two brothers and he purchased the kothi in dispute in equal shares It has not been suggested on behalf of the plaintiff that he made any second demand from the vendor, nor is it suggested that he made his second demand in the presence of the property sold The plaintiff relies solely on the second demand having been made to Rahmat-ullah alone

In the case of *Gunput Jha* v *Anund Singh Das* (1) the making of *Talab-i-ishtishhad* with the affirmation by witnesses in the presence of one out of the several sellers was held to be a claim conformable to

(1) (1848) S D A (Lower Provinces) 22

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the Muhammadan law In the case of *Birj Beharee Singh* v *Durbaree Lal* (1) three learned Judges of the Suddar Dewanny Adalat held that it was not necessary for the plaintiffs to prove more than that they had duly preferred their claim to *one or other* of the joint purchasers, or the joint sellers No authority for this view is to be found in the judgements The learned Judges apparently thought that the word ' seller " or " vendee " used in the singular in Muhammadan law books meant any one of the sellers or the purchasers

On the other hand, in the case of *Aliman Begam* v *Ali Husain* (2), it was held that the singular words " vendor " and " vendee " included the plural also and that, therefore, if the demand was made neither in the presence of the vendor nor on the property sought to be pre-empted, but in the presence of the vendees, then in case there were more than one vendee, the demand should be made in the presence of all This last mentioned case is a clear authority for the view that if the second demand has been made to only one of the several vendees, the plaintiff cannot get the whole property. The further question whether the pre-emptor can get a proportionate share of property from the vendee to whom he did make the demand was not considered by the Bench As the case was dismissed summarily under order XLI, rule 11, and the argument is not reported, it is not clear whether this aspect of the question was pressed before the Bench or not.

The rule governing interpretation of statutes, namely, that the singular includes the plural. cannot be pushed to its extreme limit in the Muhammadan law, as that would necessitate the making of the second demand in the presence of each of several

(1) (1850) S D A (Bengal) 585 (2) (1923) I L R , 45 All , 449

properties sold, though by one transaction and to one vendee

It is remarkable that in none of the leading books on Muhammadan law, for example, "Fatawa Alamgiri," "Hedaya," "Fatawa Kazi Khan," "Durrul Mukhtar," "Sharah Waqaya," "Aini" and "Mabsut of Sarakhsi," is to be found any clear passage expressly stating whether more than one second demand is or is not necessary in the case of several vendees The only reason for such omission seems to be that the result is supposed to follow logically from the view of the Muhammadan jurists that in the case of a sale to several vendees there is a discrimination of their interest from the very beginning that is to say, though the sale is effected by one transaction and only one price may be mentioned, it is supposed to be really distinct and separate so far as each vendee is concerned The principle on which the Muhammadan jurists proceed is that a pre-emptor may object to the introduction of a particular vendee though he may not like to object to another co-vendee. On this ground they allow the pre-emptor to pre-empt the share of one of the several vendees, leaving out those of the rest Their reasoning is that, unlike the case where a purchase is made from several vendors, the integrity of which cannot be allowed to be broken up, one vendee suffers no loss if his share alone is pre-empted and the shares of the other vendees are not pre-empted In their opinion this does not amount to a splitting up of any transaction inasmuch as they regard each vendee as if he entered into a separate transaction It follows that if the pre-emptor intends to pre-empt the share of one vendee only he may make the demand to him alone but if he wishes to pre-empt the shares of all the vendees he must make the demand to all of them, as their transactions are

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different. It is to avoid the inconvenience of making demands to several vendees or to several sellers, especially when some of them may intentionally keep out of the way, that provision has been made for the making of the demand in front of the property sold. To avoid difficulties of the kind which has arisen in this case, the easiest course for the pre-emptor is to make the second demand in front of the property.

There is a consensus of opinion that a pre-emptor can pre-empt the share of one of several purchasers and there is abundant authority in support of it. In the "Hedaya," Volume III, Book 38, Chapter IV, section 3, it is stated:—

"If five persons purchase a house from one man, the Shafee may take the proportion of any one of them. If, on the contrary, one man purchases a house from five persons, the Shafee may either take or relinquish the whole, but is not entitled to take any particular share or proportion. The difference between these two cases is that if, in the latter instance, the Shafee were allowed to claim a part, it would occasion a discrimination in the bargain to the purchaser, and be productive of very great inconvenience to him; whereas, in the former instance, the Shafee being merely the substitute of one of the five purchasers, no discrimination in the bargain is occasioned. There is no difference in the law in either of these cases, whether in making the purchase, a certain proportion of the price had been set against each proportion of the house, or whether one price had been in general terms agreed upon for the whole; for the law is grounded only upon the discrimination in the bargain."

[Hamilton's "Translation of Hedaya" (2nd edition), page 564.]

Similarly, in "Fatawa Alamgiri," Volume 4, Chapter IV, it is stated:—

"If two persons buy a house from a third person then according to the general consensus of opinion the pre-emptor has the right to take the share of one of the purchasers, whether before or after possession, for the bargain has been separate from the very beginning and the taking of a part

is no division of it, and it is the same whether before or after possession and whether half the price is mentioned for each or one price is mentioned for both "

[Incorporated almost verbatim by Baillie in his "Digest of Muhammadan Law" (2nd edition), Volume I, page 498.]

Similarly, the author of the "Durrul Mukhtar" quotes the text of "Tanwir-ul-Absar" (on which it is a commentary) that—

"If a number of persons purchase a property jointly and there is only one vendor *there are as many takings by pre-emption as* there are purchasers" (يتعدد الاخذ بالشفعة بتعدد هم) Consequently the pre-emptor has the option of purchasing the share of some and giving up the rest, but not the reverse of this" The author adds that in the former case the pre-emptor steps into the place of one of the purchasers and thus there is no splitting of the bargain, and that it makes no difference whether it is before possession or after it, or if the price of each is fixed separately or jointly, because "what is taken into consideration is the unity of the bargain and not of the consideration."

[B. M. Dayal's Reprint, page 399.]

Similar passages can be quoted from the other books referred to above, but it is not necessary to do so as they all lay down the same rule

In view of these authorities it is clear that the second demand made by Muhammad Askari to Rahmat-ullah was a good and valid demand according to the Muhammadan law so far as Rahmat-ullah's share was concerned, but it was not effective for purposes of claiming the shares of Rahmat-ullah's brothers As the plaintiff had the option of pre-empting the share of any one of the vendees, it is clear that his omission to make the necessary demand from two of the vendees does not deprive him of his right to pre-empt the share of Rahmat-ullah No other point is pressed

We accordingly allow this appeal and, modifying the decree of the court below, decree the plaintiff's

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claim for pre-emption of the one-third share belonging to Rahmat-ullah in the Malik Hotel on payment of one-third of the true sale consideration, that is, Rs 1,740, within six weeks from this date In the case of payment within the time allowed the plaintiff will have his costs in both courts against Rahmat-ullah In case of default his claim will stand dismissed against Rahmat-ullah with costs in both courts The plaintiff's claim for pre-emption of the two thirds share belonging to Muhammad Yusuf and Muhammad Yaqub stands dismissed with costs in both courts

Appeal allowed.

REVISIONAL CIVIL

Before Mr Justice Mukerji

1927

March, 16

ABDUL GHANI (DEFENDANT) *v* CHIRANJI LAL (PLAINTIFF) *

Act No IX of 1908 (*Indian Limitation Act*), *sections* 4 *and* 19—*Limitation—Acknowledgement made after expiration of three years' period but before suit on promissory note was barred—"The period prescribed"*

An acknowledgement of a debt made after the expiration of the three years' period prescribed by schedule I to the Indian Limitation Act, 1908, for a suit on a promissory note, but made before a suit on the note is actually barred by limitation, is a good acknowledgement *Sheo Partab Singh* v. *Tajammul Husain* (1), followed *Bai Hemkore* v *Masamalli* (2), dissented from

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

Dr. *N C Vaish*, for the applicant

Pandit *Uma Shankar Bajpai*, for the opposite party

* Civil Revision No 209 of 1926

(1) (1926) I L R, 49 All, 67 (2) (1902) I L R, 26 Bom, 782

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MUKERJI, J :—The question of law raised by this application in revision is whether an acknowledgement of a debt made after the expiration of the three years' period prescribed by schedule 1 for a suit on a promissory note but made before a suit on the note was actually barred by limitation, was a good acknowledgement.

It appears that the acknowledgement in this case was made while the right of institution of suit was still subsisting owing to holidays having come in The limitation was to expire on the 17th of October, 1923, on the promissory note on which the suit was brought, but the suit could be instituted on the 23rd as the period between the 17th of October and the 22nd of October, 1923, was a holiday.

The court below has decided against the defendant. hence this application in revision

The answer to the question must depend on the correct reading of section 19 and section 4 of the Limitation Act. Section 19 says —

"Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgement of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed"

The period prescribed for a suit is not necessarily the period prescribed by schedule 1 of the Limitation Act "The period prescribed" would mean, in the ordinary sense of the words, the period prescribed by law, that is to say, the period prescribed by the entire body of the Limitation Act The schedule 1 read with section 4 of the Limitation Act would mean that the period prescribed for a suit on this particular promissory note, which was executed on the 17th of

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October, 1920, was between the 17th of October, 1920, and the 23rd of October, 1923 In my opinion there is no reason to limit the sense of the expression " the period prescribed " to the period prescribed in the schedule alone Where such idea is meant to be expressed, adequate words have been used for that purpose, for example, in section 3 of the Limitation Act we find the words " by the first schedule " added to the word " prescribed." In the case of *Sheo Partab Singh* v. *Tajammul Husain* (1) a Division Bench of this Court considered whether an acknowledgement made within the period prescribed by section 31 of the Indian Limitation Act was a good acknowledgement. Their Lordships held that it was. This is, in my opinion, with respect, good law I do not agree with the view taken in *Bai Hemkore* v. *Masamalli* (2).

I hold that the acknowledgement was within time and did operate to extend the period of limitation.

The application fails and is hereby dismissed with costs.

Application dismissed

MISCELLANEOUS CIVIL.

Before Mr Justice Mukerji.

1927 March, 16.

IN RE THE UNION INDIAN SUGAR MILLS Co , LTD (IN LIQUIDATION) *v* BRIJ LAL, JAGANNATH *

Act No VII of 1913 (*Indian Companies Act*)—*Liquidation—Claim against a company in liquidation based on a compromise decree—Circumstances in which a liquidator must accept the decree or is entitled to call for proof of the claim.*

Where a judgement has been obtained after a trial of issues by a court, where there has been a *bonâ fide* litigation, the trustee in bankruptcy or the official liquidator, in the case of an insolvent company, will not ordinarily go behind

* Miscellaneous Case No 36 of 1926

(1) (1926) 24 A L J R , 1039 (2) (1902) I L R , 26 Bom , 782

the judgement and try to look into the consideration for the same But where the judgement has been obtained on confession or compromise, or there are circumstances justifying the trustee in bankruptcy or the official liquidator to doubt the *bonâ fides* of the judgement, or there are circumstances to show that there has been a miscarriage of justice, it would be open to them to call for fresh proof of the claim *In re Onslow* (1), *In re Van Laun* (2), *In re Fraser* (3), *In re Lennox* (4), *In re Flatau* (5) and *In re Hawkins* (6), referred to.

THIS was a claim against a company in liquidation under the Indian Companies Act, 1913.

The facts of the case are fully set forth in the order of the Court

Dr *Kailas Nath Katju*, for the official liquidator.

Mr. *B. E. O'Conor*, Mr. *A. Sanyal*, Munshi *Haribans Sahai* and Munshi *Ramnama Prasad*, for the claimant.

MUKERJI, J. :—This is a claim against the Union Indian Sugar Mills Co., Ltd., in liquidation, by one Rai Bahadur Brij Lal of Ludhiana and his partner Jagannath, seeking their entry on the schedule of creditors to the amount of Rs. 60,000. They base their claim on a judgement, said to have been passed on foot of a compromise, by the Subordinate Judge of Ludhiana on the 10th of March, 1926. The claim was opposed before the official liquidators by Lala Devi Dat, the late managing director of the company The official liquidators, after examining the claim, allowed it in respect of three sums of money, viz Rs 25,000 principal sum, Rs. 1,750 interest and Rs 500 as "office expenses" They disallowed the rest of the claim Thereupon the claimants filed their application in this Court, asking it to try their claim. The official liquidators have contested it

(1) (1875) 17 Ch App Cas, 373 (2) (1907) 2 K B, 23
(3) (1902) 2 Q B, 633 (4) (1885) 16 Q B D, 315
(5) (1888) 22 Q B D, 83 (6) (1895) 1 Q B, 404

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The claim was based briefly on the following facts. On the 26th of December, 1923, the firm of Brij Lal was appointed the sole agent of the Union Indian Sugar Mills Co., Ltd., within certain tracts of the Punjab. An agreement in writing was drawn up. Under the terms of the agreement, the firm of Brij Lal made a deposit of Rs 25,000 with the company and received certain privileges in selling sugar manufactured by the company. The firm of Brij Lal, Jagannath was to get a certain interest on their money and they were to receive, besides brokerage, a commission of 1 per cent. on the value of sugar sold by them. This commission was, later on, increased to 1¼ per cent. The claimants gave a notice to the company, on the 1st of July, 1925, stating that the company were responsible for various breaches of covenants made by them, that the firm had suffered damage and that the damages and the principal money deposited amounted to Rs 1,00,000. Thereafter, on the 23rd of December, 1925, the firm of Brij Lal instituted a suit which was afterwards numbered as 2 of 1926 in the court of the Subordinate Judge of Ludhiana. The suit was decreed under circumstances to be detailed hereafter and, as already stated, a decree was passed on the 10th of March, 1926. The claimants' contention is that the decree is conclusive of their title to get the amount claimed.

The official liquidators were of opinion that the decree was not conclusive and the claimants were bound to put their original claim before them so that they might see how far it was justified.

When the claim of the firm of Brij Lal, Jagannath came for consideration in this Court the position taken up by the official liquidators was the same as was taken by Lala Devi Dat before the official liquidators. Their case is that the court at Ludhiana had no

jurisdiction to entertain the suit, that the claim for damages was altogether false, and the decree based on an alleged compromise was obtained by adducing perjured evidence before the court. The official liquidators deny that there was any compromise at all Their further contention is that, decree or no decree, they were entitled to call upon the claimants to establish their title to damages and the amount to which they were entitled before them.

In view of these pleadings, the following four issues were framed by the Court. The issue No. 4 was added subsequently, the first three issues having been framed in the first instance.

ISSUES

1 Whether the decree passed by the Ludhiana court was passed without jurisdiction?

2 Whether the compromise decree was obtained by the claimants by exercise of fraud on the court?

3. If issues Nos 1 and 2 are decided against the claimants, whether they are entitled to any and what damages?

4. Whether in the circumstances of the case the compromise was to the material disadvantage of the company and, therefore, the compromise, even if honestly entered into by Lala Devi Dat on behalf of the company, is not binding on the official liquidators?

It may be stated at the outset that it was originally thought expedient to try the first two issues together and the third and fourth issues also together but after the decision of the issues Nos 1 and 2. But in the course of the argument it became abundantly clear that the main question between the parties was involved in the issue No 4 The question of law involved in it was argued thoroughly before me,

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and I have decided to record my finding on this issue as well. Dr. *Katju* has intimated to the Court that he reserves his right to re-argue the issue No 4 in the light of such further evidence as may be adduced in the course of the trial of issue No. 3

[Issues Nos. 1 and 2 were then discussed on the evidence and decided in the negative. The judgement then continued as below :—]

Issue No 4.—I have already stated above that I propose to decide the issue No 4 at once, although Dr. *Katju*, on behalf of the official liquidators states that he reserves his right to re-argue the issue when evidence is taken on issue No. 3

The whole question that really arises in this case is whether the decree obtained by the firm of Brij Lal, Jagannath is conclusive as to their title to damages and to the amount thereof, or whether the official liquidators can put the decree aside and call upon the claimants to establish their claim before them. The law on the point seems to me to be abundantly clear both on principle and on authority.

The company in this case must be and has been throughout treated as an insolvent company There can be no doubt that it was in an insolvent condition and was unable to pay its debts which amounted to nearly Rs. 10,00,000. The winding-up order was obtained by a firm of creditors, Messrs. Moti Lal Ram Kumar, whose claims amounted to over Rs 3,00,000. Frantic efforts were made on behalf of Lala Devi Dat, the managing director, to obtain financial assistance to tide over the difficulty but he failed. The premises of the company and the machinery were all mortgaged to the Imperial Bank of India. There can, therefore, be no doubt that this was a case of an insolvent company. The case of an insolvent company and the case

of an individual who is declared an insolvent are on the same footing, in the eye of the law. The official receiver, in the case of a person who is adjudged an insolvent, the trustee in bankruptcy, as he is called in England, and the official liquidator of an insolvent company stand on the same footing. They are not the representatives of the insolvent, the individual or the company. On the one hand they represent the estate of the insolvent, on the other hand they represent the interest of the whole body of creditors. The duty of the trustee in bankruptcy or the official liquidator is to distribute the assets of the insolvent, individual or the company, among such of their creditors as have a just claim. Such being the case, the decree that may be valid and binding on the insolvent is not, necessarily, valid or binding against the trustee in bankruptcy or the official liquidator. It is necessary to elaborate the point. I will quote the provisions of the law before further discussing the question. Under section 229 of the Indian Companies Act of 1913, "In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable, etc., etc., as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent . . ." Under section 34 (2) of the Provincial Insolvency Act "All debts and liabilities to which the debtor is subject when he is adjudged an insolvent . shall be deemed to be debts provable under this Act." It is clear the debts have to be "proved" by claimants before they can expect to be entered in the schedule of creditors. The proceedings in liquidation and the proceedings in insolvency are entirely in the nature of equitable proceedings. A company or an individual

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is unable to pay its or his debts, the matter is brought before the court, the court takes possession of the assets of the insolvent party and directs that all the creditors should be treated justly and equitably. Such being the jurisdiction of the court, it stands clear to reason that nobody has a right to claim more than is justifiably due to him, on the mere ground that the insolvent, the individual or the representatives of the insolvent company, had agreed to pay to the claimant more than what was justly and properly due to him. Nobody, on either side, has really contested this proposition of law which has received the support of eminent jurists, as I shall presently show The whole question is whether the decree is to be received as conclusive evidence of the liability of the company or whether it is open to the official liquidators to say that they would not listen to the decree but would ask the claimants in the present case to adduce evidence as to the truth of their claim On the principle enunciated, it seems to me to be abundantly clear that the decree cannot be conclusive. The decree may be binding on the company, and anybody representing the company may be bound by it. But the official liquidators are not the company nor the representatives of the company They may very well say :—" It is true that the decree is binding on the company and Lala Devi Dat by his compromise could bind the company, but in the circumstances of this particular case, we shall not look into the decree and treat it as a conclusive evidence of your right to receive damages to the sum of Rs. 33,000 " On the authorities, which I shall quote presently, it seems that the decree is not binding in certain cases, though it may be binding in others. The principle seems to be this :

Where there has been a genuine contest between a claimant or a creditor on the one hand and an

individual who is subsequently declared an insolvent or a company which goes into liquidation later on, and the parties have fought out the case, *bonâ fide*, it should not be open to the receiver or the official liquidator to reopen the case and to have, as it were, a fresh trial of strength The reason is obvious. The court has applied its mind. The parties have adduced their evidence. Such being the case, it would be a matter of extreme regret if a *bonâ fide* trial should be set aside on the sole ground that the receiver or the official liquidator is not bound by the decree. But, on the other hand, where the decree rests on something less than a real trial on the merits of the case, the question would arise whether the receiver or the official liquidator would not be justified in putting the decree aside and asking for what has been called the "consideration for the judgement" Where a judgement is obtained on the confession of the insolvent, it has been held that it is open to the trustee in bankruptcy to set apart the decree and to ask for proof of the claim. The reason is clear again. The admission of the insolvent may be binding on him, but it would not furnish proper proof of the correctness of the claim to a party who is not bound by the admission. In this particular case before me the decree does not stand at anything higher than an admission on the part of Lala Devi Dat that damages are really payable to the claimants and that the total amount should be at the figure of Rs 33,000 and odd There has been no trial by a court of justice of the case and the official liquidators who have to distribute the assets of the company equitably, may very well say "There is no doubt about the admission of Lala Devi Dat as to the justness of the claim, but we will not accept that admission and we call upon you, the firm of Brij Lal, Jagannath,

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to show to us that your claim is just and equitable." It has been repeatedly remarked that for many purposes (except its binding character on the parties) a compromise decree does not stand at a higher level than a private agreement between the parties This remark is true undoubtedly. Under section 34(2) of the Provincial Insolvency Act, all such debts are provable as accrued due before a person was adjudicated insolvent as also all such other debts to which the insolvent may become subject by reason of any obligation incurred *before* the date of such adjudication. In this case the winding-up order, although passed in June, 1926, relates back to the 7th of January, 1926, when the application for winding up was made (see section 168 of the Companies Act) The company, therefore, was adjudged insolvent, as it were, with effect from the 7th of January, 1926 In the circumstances, only such debts are provable against the company as accrued due before the 7th of January, 1926, and such other debts as became payable owing to liabilities incurred before the 7th of January, 1926 It follows that any liability that was incurred *after* the 7th of January, 1926, cannot be treated as creating a debt provable under sub-section (2) of section 34 of the Provincial Insolvency Act. The result would be that while no harm would be done to the claimants' claim, as it stood on the date of the institution of their suit, it is not open to them to prove the contract (the compromise) on foot of which the decree was made on the 10th of March, 1926 On principle and on statute law, therefore, the claimants cannot ask the decree in their favour to be treated as conclusive.

A large number of cases have been cited and discussed before me I would not discuss all of them in this judgement, I will content myself with discussing just a few of the more important cases

One of the oldest and leading cases often quoted is the case of *Ex parte Kibble, In re Onslow* (1). It was held in that case that the court of bankruptcy could look into the "consideration for the judgement" In this case an infant, before the passing of the Infants Relief Act of 1874, gave a bill of exchange, payable after his majority, to a jeweller in payment for jewellery. After his majority and after the Act came into operation, the creditor obtained judgement by default against him in an action on the bill of exchange and then took out a debtor's summons, and on his failing to comply with it, filed a petition for adjudication against him The question arose whether the applicant was such a creditor as was entitled to obtain an order of adjudication. The creditor relied on the judgement he had obtained, but it was held that the court in bankruptcy was entitled to "look into the consideration for the judgement." Sir W. M. JAMES, Lord Justice, said.

"It is the settled rule of the court of bankruptcy, on which we have always acted, that the court of bankruptcy can inquire into the consideration for a judgement debt There are obviously strong reasons for this because *the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors* If a judgement were conclusive a man might allow any number of judgements to be obtained by default against him by his friends or relations without any debt being due on them at all; it is, therefore, necessary that the consideration of the judgement should be liable to investigation"

The italics are mine.

This, as I said, is one of the leading cases on the point This case was decided in 1875, but as late as in 1907 it was found to possess its full vigour

(1) (1875) 17 Ch App Cas, 373

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In the case of *In re Van Laun, Ex parte Chatterton* (1) the head-note runs as follows :—

"No judgement recovered against the bankrupt, no covenant for payment given by or account stated with him, can deprive the trustee in bankruptcy of his right and duty to investigate the nature and grounds of the claim made against the bankrupt's estate; the trustee is, therefore, entitled to go behind these forms and to require satisfactory evidence that the debt on which the proof is founded is a real debt"

In this case the question arose whether the trustee in bankruptcy could go behind a mortgage and settled accounts by requiring particulars and vouchers before admitting the proof of the amount claimed. (By analogy the question in this case is whether it is open to the official liquidators to go behind the contract, between Lala Devi Dat and the claimant firm in the shape of the compromise, by requiring particulars and vouchers before admitting the proof of the amount claimed.) COZENS-HARDY, Master of Rolls, at page 29, delivered himself as follows —

"The trustee says 'you are a person who comes in to prove a debt It is my duty to see that this bankrupt's assets are distributed amongst those who are justly, legally and properly creditors of the estate. In order to enable me to do my duty, I ask you to furnish me with such information as will enable me to do that which I am told to do by rule 22 in the second schedule to the Act, to examine every proof and grounds of the debt'"

At another place, the learned Master of Rolls quoted from the judgement under appeal of BIGHAM, J, as follows —

"The trustee's right and duty, when examining a proof for the purpose of admitting or rejecting it, is to require some satisfactory evidence that the debt on which the proof is founded is a real debt *No judgement recovered against the bankrupt*, no covenant given by or account stated with him, can deprive the trustee of this right He is entitled to

(1) (1907) 2 K B, 23

go behind such forms to get at the truth *and the estoppel to which the bankrupt may have subjected himself* will not prevail against him."

The great authority on Company Law, viz., Lord Justice BUCKLEY, agreed with his judgement and remarked (see page 31) as follows —

"It is well settled that the court can inquire into the consideration for a judgement debt. A courageous argument has been addressed to us that a debt which has not resulted in a judgement stands upon a more firm basis than a debt which has. The mere statement of that proposition occasions surprise. I do not think it is true. Whether the creditor alleges that there has resulted and that he relies upon an account stated, or a covenant entered into by the debtor, or a judgement which he has obtained, the principle, I apprehend is exactly the same, and is this that the trustee is not the person who has stated the account, is not the covenanter, is not the judgement-debtor, but is entitled to say 'it is my business to see that those who seek to rank against this estate are persons who are really creditors of that estate.' *If there be a judgement it is not necessary to show fraud or collusion.* It is sufficient, in the language of Lord ESHER, to show miscarriage of justice—that is to say, that for some good reason there ought not to have been a judgement. Exactly the same, I think, is true of an account stated or of a covenant."

In the case of *In re Fraser, Ex parte Central Bank of London* (1) the head-note is as follows —

"Upon the hearing of a creditor's petition for a receiving order against a judgement-debtor, the court of bankruptcy has power, at the instance of the debtor himself, to go behind the judgement and to inquire into the validity of the debt, even though the debtor has previously applied in the action to set aside the judgement, and his application has been refused, and the refusal affirmed by the court of appeal."

To some extent the facts of this case and the facts of the case before me are similar. John Fraser was a debtor, against whom the Central Bank of London

(1) (1892) 2 Q.B., 633

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presented a bankruptcy petition. The judgement was obtained by the bank against a partnership firm and against John Fraser as one of the partners. John Fraser applied to set aside the judgement as against him and to allow him to defend the action. The court refused his prayer and an appeal failed. The failure of the application and the appeal was on the ground of delay and on some other grounds. On these facts Lord ESHER, Master of Rolls, said :—

"As a matter of law the judgement, therefore, stands as a good judgement against John Fraser and it cannot be questioned by him in any court, except the court of bankruptcy But when it is sought to obtain a receiving order against him in respect of the judgement debt, the court of bankruptcy has to exercise its discretion and for the exercise of that discretion one rule of conduct is to be found in section 7 of the Bankruptcy Act, 1883, which provides, by sub-section (3) that if the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, etc , etc , the court may dismiss the petition The question is whether the Registrar had not a discretion under section 7 and whether he has rightly exercised that discretion The mere fact that there is a judgement for the debt does not prevent the Registrar from saying that there is no good petitioning creditor's debt The court of bankruptcy can go behind the judgement, and can inquire whether, notwithstanding the judgement, there was a good debt . . . may inquire, even at the instance of the debtor, whether there is any ground for making a receiving order"

I may point out that in the Indian law the corresponding section to section 7 of the Bankruptcy Act of 1883 is section 25 of the Provincial Insolvency Act of 1920 Under this rule of law the petitioner must satisfy the court with proof of his right to present the petition. In the same case Lord Justice KAY said as follows —

"It is old law in bankruptcy that, neither upon an attempt to prove a debt, nor upon a petition for an adjudication of bankruptcy or a receiving order against a debtor, is a

judgement against him for the debt conclusive. In *Ex parte Bryant*, Lord ELDON said 'Proof upon a judgement will not stand merely upon that, if there is not a debt due in truth and realty, for which the consideration must be looked to.' Can this judgement be treated as conclusive in bankruptcy because the debtor has unsuccessfully attempted to set it aside? I think not, and I cannot see how the matter is any more *res judicata* because there has been an unsuccessful appeal to this court."

The same view was taken in the case of *Ex parte Lennox, In re Lennox* (1)

In the case of *In re Flatau, Ex parte Scotch Whisky Distillers, Ltd.* (2) relied on by Mr *O'Conor*, the case of *Ex parte Lennox* quoted above was distinguished It was held that as a matter of course the court of bankruptcy will not inquire into the validity of a judgement debt, but only when there is evidence that the judgement was obtained by fraud or collusion or when there has been some miscarriage of justice In this case the judgement was obtained after a trial of the action by MATHEW, J., with a jury. The act of bankruptcy alleged was non-compliance with a bankruptcy notice in respect of the judgement debt The question arose whether, in the circumstances, it was open to the debtor to impeach the judgement and call upon the Registrar to go behind the judgement and to look into the consideration for it. Lord ESHER, Master of Rolls, was of opinion that, *in the circumstances of the case*, it was not open to the judgement-debtor to go behind the judgement He delivered himself as follows at page 85 —

"Another point was taken—viz., that although an action has been tried by the proper tribunal, a Judge alone or a Judge with a jury, and definite issues have been thoroughly tried out, and decided against the debtor, and judgement has been given against him accordingly, he

(1) (1885) 16 Q B D., 315 (2) (1888) 22 Q B D., 83

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against whom the judgement has thus been given, without his being able to suggest that there was any miscarriage of justice at the trial, is entitled to go into the court of bankruptcy, and, even though he has appealed against the judgement, assert that the action was not properly tried, and say to the Registrar, 'you must try every one of the issues over again upon the same evidence if I choose, or upon new evidence, and you have no discretion in this matter' It is not necessary now to repeat that when an issue has been determined in any other court, if evidence is brought before the court of bankruptcy of circumstances tending to show that there has been fraud, or collusion, or miscarriage of justice, the court of bankruptcy has power to go behind the judgement and to inquire into the validity of the debt. But that the court of bankruptcy is bound in every case as a matter of course to go behind the judgement is a preposterous proposition"

In discussing the principle, I have already stated that where a judgement has been obtained, after a trial of issues by a court, where there has been a *bonâ fide* litigation, the trustee in bankruptcy or the official liquidator, in the case of an insolvent company, will not ordinarily go behind the judgement and try to look into the consideration for the same The reason is clear The matter has been already threshed out between the parties and there is no reason to suppose that the judgement has not been fairly obtained. But where there are circumstances justifying the trustee in bankruptcy or the official liquidator to doubt the *bona fides* of the judgement or there are circumstances to show that there has been a miscarriage of justice, it would be open to them to call for fresh proof of the claim. The case under discussion, therefore, is clearly distinguishable from the case before me In discussing the facts, I shall presently show that the judgement was given under circumstances which should not bind the hands of the official liquidators.

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In the case of *In re Hawkins, Ex parte Troup* (1) the petitioning creditor relied on a compromise decree The question arose whether a decree, as it stood was good enough to entitle the petitioning creditor to an order of adjudication or whether the bankruptcy court had the power to reject the judgement and to inquire into the transactions leading up to the compromise and the judgement. There was a difference of opinion and the learned Judges of the court of appeal decided against the petitioning creditor in the majority of two to one Lord Justice RIGBY's was the dissentient judgement and Mr *O'Conor* relied upon the same I have discussed the principles and I have quoted authorities After that, I do not think it is necessary for me to discuss the remarks of Lord Justice RIGBY in detail It is sufficient to say that a judgement would always give a *primâ facie* proof of a debt It is only when there are circumstances casting doubt on the correctness of the debt, as proved by the judgement, that the judgement may be set apart and independent proof may be called for There may be cases, therefore, where the compromise was entered into under circumstances which stand unimpeached and, in such cases, the compromise decree may furnish conclusive proof of the debt

The law standing as indicated above, I have to inquire whether the official liquidators were bound to accept the judgement as conclusive in favour of the claimants or whether they were justified in going behind the judgement and in asking for proof of the "consideration for the judgement" On behalf of the official liquidators, Lala Devi Dat has been examined and on behalf of the claimants Lala Brij Lal. Lala Devi Dat, it appears, holds roughly three-fourths of the capital of the company and is, therefore,

(1) (1895) 1 Q B, 404

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a person vitally interested in its welfare. Lala Brij Lal is one of the two members forming the firm of Brij Lal, Jagannath It appears from the statement of Lala Devi Dat and from the statement of Lala Brij Lal, as elicited in cross-examination, that after the agreement of the 26th of December, 1923, was entered into, a considerable amount of business was carried on by the claimants in the company's sugar in Ludhiana and other places in the Punjab Goods worth between six and ten lakhs of rupees were sold by the claimants. In April, 1925, Lala Brij Lal was at Cawnpore and he received a cheque of Rs 4,000 and odd According to the company's books, this payment was made in full satisfaction of Lala Brij Lal's claim up to that date But Lala Brij Lal says that he took the money under protest and that he claimed that more was due to him It, however, does not appear that he ever gave anything in writing, by way of notice of demand to the company, to express that protest Again, we find that as a result of some conversation between Lala Devi Dat and Lala Brij Lal, the remuneration of agents was increased from 1 per cent to $1\frac{1}{4}$ per cent. The letter, then written, is on the file of the Ludhiana case and is dated the 14th of April, 1925 It says that the company were pleased with the manner in which their agents had been carrying on their business and were pleased to grant an increase in the rate of commission and were further pleased to grant, by way of office expense, a sum of Rs. 60 per mensem. These transactions would go to show that up to April, 1925, there were no serious disputes between the parties Suddenly we find that on the 1st of July, 1925, a notice was sent by the claimants to the company demanding a return of their deposit, interest thereon and the large amount of Rs 73,000 as damages A reply was sent

by the company, Lala Brij Lal would not admit that a reply was received by him. He was obliged to make a non-committal sort of reply that the company's reply to his notice may have been received in his office at Ludhiana but he never saw it. Six months later, we find that the suit is instituted The plaint is a curious document It does not show how the large claim of Rs. 73,000 as damages is made up. Various allegations of breach of covenant are made against the company, but there is no indication given as to how the amount claimed as damages was arrived at Lala Brij Lal admits that before the institution of the suit he had come to know that the company was in an embarrassed condition He had been applied to, on behalf of Lala Devi Dat, to render pecuniary assistance to the company The father of Jagannath, the partner of Lala Brij Lal, is a respectable and rich man and, according to Lala Devi Dat, is reputed to possess a huge amount of wealth. He is the well-known gentleman, Lala Ralla Ram, C I E., the late Engineer of the E B. Railway Lala Devi Dat expected that Lala Brij Lal would be able to pay off the debts of the company and to employ several lakhs of rupees in the working of it, so that the company would do business and pay off Lala Brij Lal's debts gradually Lala Brij Lal admits that when he was approached for financial help, he went to Cawnpore and the matter was discussed between him and Lala Devi Dat Lala Brij Lal had instituted two suits against Lala Devi Dat, one was the suit against the company in Ludhiana and the other was a suit against Lala Devi Dat and his son personally in the Karachi court The latter was for Rs. 13,000 But there was another sum of Rs 12,000 due to Lala Brij Lal, but this sum was not yet fallen due The evidence of Lala Brij Lal, as elicited in cross-examination, shows

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that Lala Devi Dat was making frantic efforts to raise money to avoid the company going into liquidation and was entirely in the hands of Lala Brij Lal for the time being Lala Brij Lal had given him hopes of assistance. It is in these circumstances that it is said that Lala Devi Dat agreed that the claimants' suit should be decreed for the sum of Rs. 60,000. Lala Brij Lal was questioned as to the manner in which the sum of Rs 60,000 was arrived at. According to him, when the compromise was discussed, Lala Brij Lal possessed no document upon or about him but a copy of his plaint. In arriving at the figure of Rs 33,000 damages payable by the company, the different heads of the claim were not examined All that was done was something like this Lala Brij Lal said that a lakh of rupees was due to him, Lala Devi Dat said, "well I would pay nothing beyond the deposit money and interest" Lala Brij Lal came down, say, to the sum of Rs. 10,000. Lala Devi Dat went up in his offer and offered, say, Rs. 40,000. Thus haggling went on till the amount of Rs. 60,000 was arrived at Even if this be the truth and the whole truth, it is perfectly clear that so far as the company was concerned the compromise was not arrived at under circumstances which should bind the hands of the official liquidators If Lala Devi Dat had scrutinized the heads under which the claim for damages were made and if he had found and believed that it was a just claim properly arrived at, it might have been argued with some strength that Lala Devi Dat having discussed the matter found the proper figures in favour of the claimants and the compromise should be accepted by the official liquidators. But nothing like that happened. With the winding-up case hanging over his head like the sword of Damocles, with the assurance of help from Lala

Brij Lal, with the suit at Karachi pending against him, it is said that Lala Devi Dat somehow or other succeeded in reducing Lala Brij Lal's claim to the sum of Rs. 60,000 and that, *therefore*, the compromise should bind the official liquidators This is an impossible proposition and I am not able to accept it Lala Brij Lal had admitted that whenever the company made a mistake in debiting Lala Brij Lal with even small sums of money, he protested. Yet he was able to give up Rs 40,000 out of what he calls his *bonâ fide* and just claim for damages to an amount of Rs 73,000. He said that he gave up this large portion of his claim because he knew that the company were in financial difficulties and Lala Devi Dat's condition was no better and that it was out of good fellow-feeling that he did so. This explanation will not hold water On the face of circumstances the claim, even if partially correct, was a highly exaggerated one and the compromise was arrived at, if one was at all arrived at, under circumstances which would go to show that Lala Devi Dat was not a free agent, and, at any rate, was not looking to the interest of the company as a man at arm's length towards the claimants If Lala Devi Dat agreed to the terms of the compromise in the hope that by sacrificing a few thousand rupees in favour of the claimants, he would be able to reconstruct the company and to save it from the dire disaster of liquidation, it cannot be said that the consent was freely given, when, as a matter of fact, the claimants rendered no assistance to the reconstruction of the company.

For the foregoing reasons of fact and law I am clearly of opinion that there are circumstances which thoroughly justified the official liquidators in rejecting the claim of the firm of Brij Lal, Jagannath as based on the compromise decree and in calling upon them to submit fresh proofs of their claim.

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The result of these findings would be that the firm of Brij Lal, Jagannath would be entitled to adduce fresh evidence of the amount of damage actually suffered by them.

On the question of damage, Dr *Katju* for the official liquidators and Mr. *O'Conor* on behalf of the claimants have agreed that there are not sufficient pleadings on the record The plaint of the claimants, as already remarked, is a meagre document, in spite of its length, and does not state clearly on what grounds the claim has been based Before the issue No. 3 is tried by this Court, the claimants should file a written statement describing how the amount of the claim has been arrived at, so that the official liquidators may be in a position to see if any and what portion of the claim is just and should be admitted by them. This procedure would be necessary in the interest of the parties and would serve to save the time of the court. Of course the result of the decree being put aside is this, that the claimants would be entitled, if they so choose, to claim and prove the entire amount of damages as originally claimed by them It will be, therefore, for them to state whether they maintain their claim for damages at the reduced figure arrived at by the compromise or they would go back to the original figure of Rs. 73,000 and odd

I direct the claimants to file a written statement furnishing particulars of the damages claimed by them. I grant three weeks' time for this purpose. The written statement must be filed on or before the 6th of April and the official liquidators will be furnished with a copy of the same on or before the said date The official liquidators will have three weeks to file a reply which must be filed on or before the 27th of April and a copy of it must be furnished to

the counsel for the claimants. The two written statements will then be put before the court on the 29th of April for such orders as may be called for.

The question of costs is reserved till the final disposal of the proceedings. Mr *Haribans Sahai* expresses the wish of his clients that they may be paid the amount which the official liquidators were prepared to allow to them, without prejudice to his clients' claim for more. There seems to be no difficulty in this. I direct the official liquidators to pay the claimants the sum of Rs. 25,000 in part payment.

The parties have referred to many documents on the file of the Ludhiana court. Certified copies of those documents must be obtained quickly and placed on the record of these proceedings If this is not done, those documents will not be treated as evidence

The claimants, if they wish to adduce any further documents in support of their claim, must do so along with their written statements. If they fail to file such documents as may be in their possession or power and if they fail to mention in a list, to be furnished along with the written statement, such documents as they may rely upon but which are not in their possession or power, they will not be allowed to rely on such documents later on Similarly, the official liquidators, when filing their written statement, will produce in court such documents as they rely on and are in their possession or power They will also file a list of such documents on which they rely and which are not in their possession or power. If they fail to do so they will not be entitled either to produce them or to rely on them later on.

REVISIONAL CRIMINAL.

Before Mr Justice Iqbal Ahmad

1927 March, 21

BAIJ NATH *v.* KALI CHARAN AND OTHERS *

Criminal Procedure Code, sections 107 and 250—Security for keeping the peace—Compensation—Order for compensation not applicable

Section 250 of the Code of Criminal Procedure cannot be applied to proceedings under section 107 of the Code. *Ram Badan Singh* v *Janki* (1) and *Emperor* v *Ghariba* (2), followed

THIS was a reference made by the Sessions Judge of Jhansi. The facts which gave rise to it are fully set out in the following order :—

The Bench of Magistrates at Orai have found that a complaint made by Baij Nath against the opposite party was false, futile, frivolous and vexatious and has ordered Baij Nath to pay Rs 75 compensation under section 250 of the Code of Criminal Procedure.

In appeal the District Magistrate has upheld that order

It appears that on the 9th of June, 1926, Baij Nath (who had himself been bound over under section 107 of the Code of Criminal Procedure) lodged a complaint under section 107 and prayed that security be taken from the opposite party. The S D O. called for evidence under section 202 of the Code of Criminal Procedure. Thereafter he chose to regard the case as one under section 506 of the Penal Code and, on the 19th of June, sent it to the Bench for trial under that section While the hearing of the case was in progress before the Bench, the parties apparently agreed among themselves to submit the

* Criminal Reference No 164 of 1927

(1) (1923) I L R, 45 All, 363 (2) (1923) I L R, 46 All, 109

matter to arbitration. On the 26th of August the arbitrators put in an application or report stating that in their opinion the opposite party also should be bound over and the case be thereafter dismissed. At the same time the opposite party put in an application in which they accepted the finding of the arbitrators and agreed to give security. As the Bench had no power to take security, they sent the case to the S. D. O. The S D O., however, sent it back with a direction to the Bench to proceed with the trial under section 506 of the Penal Code.

In my opinion the order of the Bench under section 250 of the Code of Criminal Procedure was bad Baij Nath's complaint was under section 107 of the Code of Criminal Procedure; and section 250 does not apply to such proceedings If authority be required for this proposition, the case of *Ram Badan Singh* v *Janki* (1) covers the point Moreover, since the opposite party agreed to give security, this amounted to a plea on their part of liability for such security; vide the case of *Emperor* v *Ghariba* (2) How then can it be held that Baij Nath's request that security be demanded from them was false, futile, frivolous and vexatious? It is true that the complaint was being treated as one under section 506 of the Penal Code; but I do not consider that this affects the case. The original complaint was under section 107 of the Code of Criminal Procedure; and if the opposite party at a subsequent stage admitted their liability to give security, it is obvious that compensation ought not to have been demanded from the complainant

I direct that the record of this case be sent to the Hon'ble High Court with a recommendation that the order under section 250 of the Code of Criminal

(1) (1923) I L R , 45 All , 363 (2) (1923) I L R , 46 All , 109

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Procedure be set aside Before the record goes, the lower appellate court will be given an opportunity to submit a statement in support of its order.

Dr. *M. Wali-ullah* (Assistant Government Advocate), for the Crown.

The opposite parties were not represented

IQBAL AHMAD, J. —For the reasons given by the learned Sessions Judge I accept the reference, set aside the order passed by the Bench of Magistrates at Orai under section 250, Code of Criminal Procedure, and direct that the amount of compensation, if already paid, be refunded to Baij Nath

Reference accepted.

Before Mr Justice Ashworth

EMPEROR *v* RAM PRASAD

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March, 21

Criminal Procedure Code, sections 476 and 195(5)—Procedure —Complaint—Order by District Magistrate for the withdrawal of a complaint of an offence under section 211 of the Indian Penal Code made by a special magistrate

Under section 476 of the Code of Criminal Procedure as it now stands a court must make a complaint and cannot directly order prosecution That complaint must set forth the offence, the precise facts on which it is based and the evidence available for proving it

A District Magistrate cannot order the withdrawal of a complaint made by a court under section 476 of the Code of Criminal Procedure, in respect of an offence falling under section 211 of the Penal Code as such a complaint is not referred to in section 195(5) of the Code of Criminal Procedure, which gives the Magistrate the power of withdrawal.

THIS was a reference from the Sessions Judge of Benares. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

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* Criminal Reference No 188 of 1927

The parties were not represented.

ASHWORTH, J.:—This is a reference by the Sessions Judge of Benares calling attention to the illegality of an order of the District Magistrate of Benares, dated the 20th of October, 1926, wherein he purports to order the withdrawal of a complaint made by a Special Magistrate against certain persons of an offence under section 211 of the Indian Penal Code (false charge) committed in his court. For the reasons stated by the Sessions Judge the District Magistrate could not order the withdrawal of a complaint made by a court under section 476 of the Code of Criminal Procedure, in respect of an offence falling under section 211 of the Indian Penal Code as such a complaint is not referred to in section 195(5) of the Code of Criminal Procedure which gives the Magistrate the power of withdrawal But I find from the record that there has been no complaint made by the Special Magistrate What is treated as a complaint by the District Magistrate is an order, dated the 30th of September, 1926, for the institution of a case Under the present law a court must make a complaint and cannot directly order prosecution. The complaint must set forth the offence, the precise facts on which it is based and the evidence available for proving it

In the circumstances I set aside both the District Magistrate's order of withdrawal and also the original order of the Special Magistrate directing prosecution. The question whether a court can review its order refusing to make a complaint under section 476 of the Code of Criminal Procedure, which has been raised by the Magistrate is one that I do not consider it necessary to decide in this reference I would point out, however, in view of an appeal being allowed by section 476B, that a

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review would appear undesirable, and the Code of Criminal Procedure generally makes no provision for a review An appealable order would, at any rate, appear to stand until set aside by an order in appeal or revision

Before Mr. Justice Ashworth.

EMPEROR *v.* SITA RAM.*

1927 March, 21

Act No. VIII of 1914 (*Indian Motor Vehicles Act*), *section* 8 —"*Driver*"—*Notice by Magistrate requiring a driver licensed for the United Provinces to produce his licence in court*

Rule 22 of the rules framed under the Indian Motor Vehicles Act, 1914, does not apply to a person who holds a licence to drive in the United Provinces To such a person section 8 of the Act applies, and the effect of that section is that, though he may be called upon, when driving, by any police officer to produce his licence, it is not lawful for a Magistrate to issue notice to him to produce his licence in court or at the Magistrate's house.

THIS was a reference from the District Judge of Etawah The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

The parties were not represented.

ASHWORTH, J —This is a reference by the District Magistrate of Etawah submitted through the Sessions Judge of Mainpuri.

A Magistrate issued a notice to the driver of a motor vehicle to produce his licence and fined him Rs. 15 for not doing so. The District Magistrate is of the opinion that the notice was illegal as it was not delivered by the Magistrate to the driver on the road, but was an order requiring the driver to attend the Magistrate's house or court with his licence The Magistrate pleads that the order was permissible under rule 21 of the Motor Rules. This rule

* Criminal Reference No 176 of 1927

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has nothing to do with the matter and the following rule 22 must be intended. The rule runs :—

"The issue of a licence to a driver of motor vehicles in the United Provinces shall not be necessary in the case of a person duly licensed to drive in any other province provided that such person shall produce his licence when so required by any Magistrate or police officer in the United Provinces."

It appears that the Superintendent of Police informed the District Magistrate that the accused was duly licensed in the United Provinces. He was not, therefore, a person licensed to drive in another province and not licensed in the United Provinces and it is only to such a person that rule 22 applies. The only provision of law applicable to a driver with a licence to drive in the United Provinces is section 8 of the Indian Motor Vehicles Act, 1914, which requires a driver to produce his licence upon demand by any police officer. No person is a driver within the meaning of this section 8 unless driving. In this case the accused was neither a driver, nor called on by a police officer to produce his licence. If rule 22 had been applicable, I am not prepared to hold that demand by the Magistrate could only be made from a person actually driving The rule speaks of a person and not a driver The conviction, however, was for the reason stated bad in law and is hereby set aside The fine, if paid, will be returned

Conviction set aside.

APPELLATE CIVIL.

Before Justice Sir Cecil Walsh and Mr Justice Banerji

1927 March, 22

MATBAR SINGH AND OTHERS (DECREE-HOLDERS) *v* ABHAI NANDAN PRASAD (JUDGEMENT-DEBTOR) *

Civil Procedure Code, order XXII, rules 2 and 3—Pre-emption—Suit by several plaintiffs—Suit dismissed—Appeal—Death of a plaintiff pending appeal—Remand—Suit continued and decree passed ignoring the fact of the death of one plaintiff—Joinder of a "stranger" in the suit

Nine plaintiffs brought a suit for pre-emption The suit was dismissed by the trial court The plaintiffs appealed, and pending the appeal one of them died No steps, however, were taken to bring upon the record any representative of the deceased plaintiff appellant The appeal proceeded and resulted in an order remanding the suit to the court of first instance for re-trial Again, the attention of the court was not drawn to the fact that one of the plaintiffs was dead and a decree was passed in favour of the whole nine of them The eight original plaintiffs with the legal representatives of the deceased plaintiff then applied for execution, and were met with the objection that the decree, having been passed in favour of one plaintiff who was dead at the time of its passing, was a nullity, and this objection was sustained.

Held, on appeal by the plaintiffs that, when the decree was passed in favour of the plaintiffs, it was a decree passed in favour of the eight pre-emptors and a person who must be deemed, by reason of the abatement of his appeal against the original dismissal of his suit, to have been a person without right, i.e , a stranger The suit, therefore, ought in the circumstances to have been dismissed

THE facts of the case are fully stated in the following order referring the appeal to a Bench of two Judges :—

IQBAL AHMAD, J. —This is a decree-holders' appeal in an execution case and is directed against

* First Appeal No 414 of 1926, from a decree of Kauleshwar Nath Rai, Subordinate Judge of Gorakhpur, dated the 12th of July, 1926

an order passed by the court below refusing to execute the decree on the ground that that decree was null and void and incapable of execution.

There is no controversy about the facts. A suit for pre-emption was brought by nine persons One of the nine plaintiffs was a man named Girdhari Singh The suit was dismissed by the trial court and an appeal against the decree of the trial court was filed in the High Court. During the pendency of the appeal Girdhari Singh died and his legal representatives were not brought upon the record. The appeal was heard and decided by the High Court in ignorance of the fact that Girdhari Singh was dead. The appeal was allowed by the High Court and the case was remanded to the court of first instance for trial on the merits The fact that Girdhari Singh was dead was also not brought to the notice of the trial court, and that court eventually passed a decree in favour of all the nine plaintiffs. The surviving eight plaintiffs and the legal representatives of Girdhari Singh, having deposited the consideration money within the time fixed by the decree to the credit of the vendee, applied for execution of the decree by delivery of possession of the property. The vendee judgement-debtor objected to the execution of the decree on the ground that the decree having been passed jointly in favour of nine persons, one of whom had died before the passing of the decree, was null and void and incapable of execution The court below relying on the case of *Ambika Prasad* v. *Jhinak Singh* (1) has allowed the objection and rejected the application for execution.

The decision of the appeal must turn on a consideration of the provision of order XXII, rules 2 and 3, of the Code of Civil Procedure If the matter were

(1) (1922) I L R, 45 All, 286

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not covered by authority, I would have no hesitation in holding that, after the death of Girdhari Singh, the right to sue survived to the surviving plaintiffs appellants, and their omission to bring upon the record the legal representatives of Girdhari Singh did not render the decree in the pre-emption suit a nullity.

The plaintiffs in a pre-emption suit claim under their individual titles, in other words, the right to pre-empt is not a right which is jointly shared by one plaintiff with the other plaintiffs in a pre-emption suit. Every one of the plaintiffs in a pre-emption suit, if otherwise entitled to pre-empt, has a right to pre-empt the whole property, and this right is only controlled by a similar right of other pre-emptors of equal degree, and consequently in the case of various suits for pre-emption, brought by persons having an equal right of pre-emption, the property pre-empted is awarded to all the pre-emptors in equal shares. In the case of several persons, having an equal right of pre-emption, joining as plaintiffs in one suit, every one of the plaintiffs in his individual right is entitled to a decree in respect of the entire property and the mere fact of some of the plaintiffs withdrawing from the suit does not and cannot affect the right of the remaining plaintiffs to a decree for the entire property For the same reason, the death of one or some of the several plaintiffs in a pre-emption suit, though their legal representatives are not brought upon the record, cannot affect the rights of the surviving plaintiffs to claim a decree with respect to the entire property which is the subject-matter of the suit. If the legal representatives of the deceased plaintiffs are brought upon the record, they by virtue of the individual right to pre-empt the entire property vested in the deceased plaintiffs

will be entitled to a decree jointly with the surviving plaintiffs. But if the legal representatives of the deceased plaintiffs are not brought upon the record, there can be no justification for depriving the surviving plaintiff or plaintiffs of his or their right to pre-empt the entire property by dismissing the pre-emption suit The only effect of the omission to array as plaintiffs the legal representatives of the deceased plaintiffs is that they are wiped out of the case, and thereafter the right of the surviving plaintiff or plaintiffs to pre-empt the entire property remains intact. It may be that after the death of one or some of several plaintiffs in a pre-emption suit, the right to sue in place of the deceased plaintiff or plaintiffs survives to his or their legal representatives, and the omission to make those legal representatives parties to the suit results in the abatement of the suit so far as the deceased plaintiff or plaintiffs are concerned, but such abatement does not cut away or prejudicially affect the rights of the surviving plaintiffs to pre-empt the entire property. The omission to make the legal representatives of the deceased plaintiffs parties to the suit within the time allowed by law destroys the right of those legal representatives to enforce the right of the deceased plaintiffs to pre-empt the property, but that right being a right which the deceased plaintiffs did not jointly share with the surviving plaintiffs, the rights of the latter remain intact. The same reasoning applies with equal force to the case of an appeal by several plaintiffs in a pre-emption suit The death of some of the plaintiffs appellants does not disentitle the remaining plaintiffs appellants to a decree in respect of the entire property pre-empted For these reasons I am of opinion that the omission to bring upon the record the heirs of Girdhari Singh did not render

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the decree passed in the pre-emption suit a nullity. True it is that Girdhari Singh appears in the decree as one of the decree-holders, but he having died before the date of the decree, the decree must be regarded as being in favour of the surviving plaintiffs. In my judgement the principle deducible from the case of *Sarju Prasad* v. *Ram Sarup* (1), applies to the present case

But the view that I have expressed above is not in consonance with the view taken in the case of *Ambika Prasad* v. *Jhinak Singh* (2) on which reliance has been placed by the court below for holding that the decree in the pre-emption suit, by reason of the failure of the surviving plaintiffs to make the legal representatives of Girdhari Singh parties, is rendered a nullity. The case of *Ambika Prasad* was adversely commented upon by Mr. Justice MUKERJI and Mr. Justice DALAL in the case of *Wajid Ali Khan* v. *Puran Singh* (3) Mr. Justice DALAL observed that "I shall not rely upon it because the reasoning does not appear to be sound that one of several pre-emptors in equal degree cannot appeal with respect to the entire property I, should have thought that, taking the facts of the present case for an example, if the plaintiffs had failed in the first court, any one of them could have appealed alone to pre-empt the entire property."

In view of such a conflict of judicial opinion in this Court, it is desirable that this case be heard by a Bench of two Judges.

It is needless to point out that those cases in which it has been held that the omission to make the legal representatives of one of several vendees parties to the suit or appeal has the effect of causing the abatement of the entire suit or appeal, have no

(1) (1921) 19 A L J , 266 (2) (1922) I L R , 45 All , 286.
(3) (1924) I L R., 47 All , 100.

application to the present case, inasmuch as the principle underlying those decisions is that a suit for pre-emption being one which can succeed either with respect to the entire property pre-empted or not at all, the necessary consequence of the omission to bring upon the record the legal representatives of the deceased vendee is to make it impossible to pass a decree with respect to the share of the deceased vendee, and as such the entire suit or appeal abates.

For the reasons given above, I refer this case to a Bench of two Judges.

Mr. *P. N. Sapru*, for the appellants.

Babu *Piari Lal Banerji* and Mr. *Shankar Saran*, for the respondent.

WALSH and BANERJI, JJ.:—This is an appeal under the following circumstances:—

Nine persons instituted a suit to pre-empt a sale in favour of the respondent in this appeal, Rai Bahadur Abhai Nandan Prasad. The court of first instance dismissed the suit, and thereupon the nine plaintiffs filed an appeal to this Court. One of the appellants was Girdhari Singh. This Court allowed the appeal and set aside the decree of the court below and remanded the suit. The case was then finally decided by the Subordinate Judge. An application for execution having been filed by eight of the original plaintiffs and two persons who alleged themselves to be the heirs of Girdhari Singh, objections were raised by Abhai Nandan Prasad on the ground that the decree was a nullity inasmuch as Girdhari Singh had died during the pendency of the first appeal in this Court and his heirs not having been brought on the record, no steps could be taken by the persons who had applied for the execution of the decree for pre-emption. The court of first instance

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came to the conclusion that the petitioners knew perfectly well that Girdhari Singh was dead, and, therefore, his heirs not having been brought on the record, the decree was a nullity The eight original plaintiffs and the heirs of Girdhari Singh have filed an appeal to this Court contesting the judgement of the learned Judge below. This appeal having been laid before Mr. Justice IQBAL AHMAD for hearing, has been referred to a Bench. The contention of the learned counsel for the appellants is that upon the facts set forth above it did not matter whether Girdhari Singh's heirs had been brought on the record or not, because each of the other eight plaintiffs in his own right was entitled to pre-empt the sale, and he has further submitted that under the provisions of rules 2 and 3 of order XXI, the right to sue, which was vested in their co-plaintiff Girdhari Singh, survived to the other plaintiffs We have, therefore, to consider whether that contention can be accepted or not We have come to the conclusion that that contention cannot be accepted It is no doubt true that the eight other appellants had a co-extensive right to institute the suit for pre-emption, but a long series of rulings of this Court has made it clear that if in a suit for pre-emption a stranger is introduced, that suit must fail Now the position of the learned advocate for the respondent is that in consequence of the heirs of Girdhari Singh not being brought on the record, the judgement of the first court dismissing as between the nine plaintiffs and the respondent the claim of Girdhari, that decree was final and negatives the right of Girdhari Singh as a person entitled to pre-empt. Now it is conceded by Mr *Piari Lal Banerji* that if Girdhari Singh had died before the decision of the case by the learned Subordinate Judge, there is no question that the

right to sue would have survived to the other plaintiffs and no question could arise as to any decree that was passed in that suit. But when the decree was passed in favour of the plaintiffs, it was a decree passed in favour of the pre-emptors and a person who had been held as between the parties to this litigation to be a stranger. The conclusion, therefore, is that under the particular circumstances of this case and in view of the fact that a court of competent jurisdiction has held Girdhari Singh not to be entitled to pre-empt the sale, he was a stranger within the meaning of the rulings of this Court, namely, that upon joining a stranger in a suit for pre-emption the suit must fail. We have, therefore, no option but to dismiss this appeal with costs.

Appeal dismissed.

Before Mr Justice Lindsay and Mr. Justice Sulaiman

HARKESH SINGH (PLAINTIFF) *v* HARDEVI AND OTHERS (DEFENDANTS).* 1927 *March*, 23.

Hindu law—Joint property—Partition by will executed by head of—Consent of members necessary—Limitation—Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 127—*Article not applicable after partition—Adverse possession*

Even the head of a joint Hindu family has no right to make a partition by will of joint property among the various members of the family except with their consent *Brijraj Singh* v *Sheodan Singh* (1), followed.

Article 127 of the first schedule to the Indian Limitation Act, 1908, presupposes the existence of a joint family and the exclusion of a co-parcener from his joint family property. *Bisheshar Tewari* v. *Bisheshar Dayal* (2) and *Banoo Tewari* v. *Doona Tewary* (3), followed.

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* First Appeal No 193 of 1924, from a decree of Govind Sarup Mathur, Subordinate Judge of Saharanpur, dated the 22nd of January, 1924

(1) (1913) I L R , 35 All , 337 (346) (2) (1912) 15 Oudh Cases, 111.
(3) (1896) I L R , 24 Calc , 309 (314).

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The exclusive possession of one co-sharer even though coupled with the non-payment of profits cannot amount to a clear adverse possession unless there has been an ouster of the other co-parceners to their knowledge and openly *Burns* v *Bryan* (1), followed.

THIS was a plaintiff's appeal arising out of a suit for recovery of possession of property. The plaintiff's case was that he and his uncle, Shib Sahai, were members of a joint Hindu family even after the death of the plaintiff's grandfather, Kunwar Singh, and that the entire property in dispute in the case was either ancestral property which devolved upon them from Kunwar Singh or was such as had been acquired in the name of Shib Sahai out of the income of such property. The plaintiff alleged that up to 1919, when Shib Sahai died, the family was joint and he was entitled to the estate by the right of survivorship In the alternative the plaintiff claimed that even if he was not entitled to any share by right of survivorship, he had a half share in the entire estate which was joint and undivided The plaintiff's name was recorded over half shares in some properties over which he was admittedly in possession That property was accordingly not included in his claim. The plaintiff, in order to explain the delay in the institution of the suit, alleged that he had been insane off and on from the year 1916, and that certain revenue court proceedings had been taken by taking advantage of his insanity. The claim was contested by the two widows of the sons of Shib Sahai, as well as by a daughter's son, Joti Prasad. They denied that the family was joint up to 1919 and pleaded that it was in fact separate and the plaintiff had no right of survivorship. They also pleaded that under a will executed by Kunwar

(1) (1887) 12 App. Cas., 184 (192).

Singh, dated the 26th of September, 1878, certain properties had been bequeathed exclusively to Shib Sahai in which the plaintiff had no share. They also pleaded that there was a family arrangement effecting a partition of the family property which was accepted by the plaintiff, who was not entitled to challenge it after so many years. It was also pleaded that the properties acquired in the name of Shib Sahai were the self-acquired properties belonging exclusively to him in which the plaintiff had no interest.

The Subordinate Judge held that the family was not joint and the plaintiff was not entitled to a right of survivorship He, however, held that the entire property mentioned in the will of Kunwar Singh, was ancestral but that all other properties were not ancestral. He held that the plaintiff accepted the arrangement made by the will of 1878 and was not entitled to challenge it after so many years. He further held that the effect of the various litigations was that the family became divided in about 1903. Lastly, he held that the plaintiff had been out of possession for more than twelve years over the properties and that Shib Sahai's possession had been adverse As regards the technical plea that the claim was barred by section 233(*k*) of the United Provinces Land Revenue Act in respect of certain properties which had been partitioned by the revenue court, he held that that section had no application. The plaintiff appealed

Mr *Nihal Chand* and Munshi *Panna Lal*, for the appellant.

Dr *M. L. Agarwala*, Dr *Kailas Nath Katju*, Mr *Akhtar Husain Khan* and Babu *Piari Lal Banerji*, for the respondents.

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The judgement of the Court (LINDSAY and SULAIMAN, JJ.), after stating the facts as above, thus continued :—

The learned Advocate on behalf of the respondents has not challenged the finding of the court below that " the property mentioned in the will of Kunwar Singh is surely ancestral property." That finding was vague but it is not challenged. The fact is that although the will mentioned that some property was the self-acquired property of Kunwar Singh, there is no evidence to show that Kunwar Singh had any independent source of income other than the income from his ancestral properties with which he could have acquired properties as his own.

The first question which we have to consider is whether the plaintiff has proved that he was a member of a joint Hindu family with Shib Sahai up to the year 1919.

[The judgement then proceeded to discuss the evidence for or against separation and continued —]

In view of all these circumstances, we have no doubt in our minds that the finding of the learned Subordinate Judge on the question of separation must be accepted. It is true that he has not discussed the matter satisfactorily and has referred to the ten or twelve witnesses produced on behalf of the plaintiff in a cursory manner and criticized them on the one general ground that the witnesses did not know the facts in connexion with the family. It is also true that he has either misdescribed the plaintiff or wrongly stated that the defendants had shirked the responsibility of coming into the witness-box, when as a matter of fact one of the defendants, Joti Prasad, was examined. We have examined the

oral evidence and we are satisfied that it cannot in any way outweigh the inference drawn from the documentary evidence. It is not said that Shib Sahai and Harkesh continued joint in residence. No doubt for some time, as admitted by the vakil for the defendants in the Rubkar, dated the 26th of September, 1903, Harkesh went mad. It is impossible to hold that there was a re-union between Shib Sahai and Harkesh Having regard to all these circumstances, we are of opinion that the plaintiff's claim that he was joint when the latter died, cannot be maintained. His claim for any share by right of survivorship, therefore, falls to the ground.

As remarked above, it has not been disputed before us that the finding of the Subordinate Judge, unsatisfactory though it is, that the properties mentioned in the will were ancestral properties, is open to challenge We may, therefore, take it that all the properties mentioned in the will were ancestral in the hands of Kunwar Singh over which he had no absolute power of disposal without the consent of his coparceners He purported to make a bequest of the entire property and allotted a few items to Shib Sahai exclusively and the other items to both of them jointly. There was no partition in the lifetime of Kunwar Singh and the will cannot be treated as a partition in the present time. At best it was the wish of Kunwar Singh which he desired should be given effect to after his death. When Kunwar Singh died, the plaintiff was a minor. It is, therefore, impossible to imagine that the plaintiff could legally have given his consent to the arrangement intended by Kunwar Singh As held by their Lordships of the Privy Council in the case of *Brijraj Singh* v *Sheodan Singh* (1), even the head of a joint

(1) (1913) I L R., 35 All., 337 (346)

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Hindu family has no right to make a partition by will of joint property among the various members of the family except with their consent. They have independent rights in it with which he cannot interfere. Its validity can only depend on their acceptance of such an arrangement. The learned Subordinate Judge in a loose way has found that this arrangement was accepted and acquiesced in by the plaintiff for a period of forty-five years. The learned Judge has overlooked the fact that up to about 1896 Harkesh was a minor, and that for some time after that there was no disagreement between him and Shib Sahai, at any rate so long as his mother remained alive. He has also not attached due significance to the fact that from 1903 onwards Harkesh began to assert his right and to repudiate at least one provision of the will. The will had strictly provided that the property should not be divided without the consent of Shib Sahai. Ignoring that provision Harkesh proceeded to apply for partitions in the revenue court. Shib Sahai set up this will and relied on this provision. His objection was overruled by the revenue court and the plaintiff was granted the partitions. Under these circumstances, it cannot be said that the plaintiff accepted all the provisions contained in the will. He certainly repudiated one part of it. As regards the rest, there is no evidence on the record to show that he expressly or in clear language accepted the dispensation of the property made by his grandfather. The inference drawn by the Subordinate Judge is based entirely on the circumstance that the present suit was not instituted till the year 1923. From the long delay which has taken place the learned Judge has inferred that the plaintiff must have accepted the arrangement made by his grandfather. We are unable to draw that inference.

Part of the delay is explained by the circumstance that the plaintiff was off and on of insane mind and it is also explained partly by the fact that he proceeded to get partitions of villages one after another through the revenue court, which was a much easier process than the institution of a suit in the civil court. We have shown that Harkesh did not accept one part of the will. There is no evidence to show that he expressly accepted the other parts. His mere silence for a long time or the delay in bringing the suit cannot, therefore, justify the inference that this will was accepted by him. So far as the mutation of names is concerned, that was effected soon after the death of Kunwar Singh when the plaintiff was a minor of tender years and had no voice in the matter. After the mutation took place the plaintiff could not get the entries corrected through the revenue court unless and until he had established his right through the revenue court. We are, therefore, unable to accept the finding of the Subordinate Judge that this arrangement was accepted and acquiesced in by the plaintiff so as to amount to an estoppel and prevent him from going behind it. Kunwar Singh, as pointed out above, had no dispensing power over the joint property and the document as a will is inoperative. We must, therefore, hold that it is not a bar to the present claim of the plaintiff.

The next point to consider is whether the claim is barred by limitation. The learned Advocate for the respondent has argued that the present suit is governed by article 127 of the Limitation Act and that, therefore, the period began to run from the date when the plaintiff was excluded from the joint family property. We are of opinion that the article is not applicable inasmuch as there is no joint

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family now in existence. As held in the case of *Bisheshar Tewari* v *Bisheshar Dayal* (1) and the case of *Banoo Tewary* v. *Doona Tewary* (2), that article presupposes the existence of a joint family and the exclusion of a co-parcener from his joint family property The proper article governing this suit is article 144, in which case the defendants must prove adverse possession for more than twelve years The learned Subordinate Judge has found that the plaintiff has been out of possession over these properties for more than twelve years and that Shib Sahai had been in adverse possession As regards the properties which were the properties of the parties and which did not under the will come exclusively to Shib Sahai, both Shib Sahai and Harkesh must be treated as co-parceners Even after 1903 when a disruption in the joint status of the family took place, the parties must be deemed to have continued to be co-owners entitled to equal shares in the undivided properties. It is well established that the exclusive possession of one co-sharer even though coupled with the non-payment of profits, cannot amount to a clear adverse possession unless there has been an ouster of the other co-parceners to their knowledge and openly *Burns* v. *Bryan* (3).

The learned Subordinate Judge was perhaps conscious of this difficulty and hence he relied on the setting up of the will by Shib Sahai in the litigations of 1903. As remarked above, one of the pleas raised by Shib Sahai in the partition suit was that the claim for partition was not maintainable in view of the provision of the will that there should be no partition without Shib Sahai's consent The learned Subordinate Judge has not appreciated that the partition proceedings related to properties which were

(1) (1912) 15 Oudh Cases, 111 (2) (1896) I L R. 24 Calc, 309 (314)

(3) (1887) 12 App Cas, 124 (192)

jointly entered in the names of the two parties and not to the properties which were exclusively assigned under the will. The written statement of Shib Sahai, therefore, cannot be taken to be an express assertion of adverse possession as regards the first class of items, namely, those which were entered exclusively in his name and which were not in dispute before the revenue court. The mere fact that Shib Sahai relied upon one provision of the will would not justify us in holding that he was openly asserting his adverse possession as regards items to which he did not refer and which were not even in dispute. We are, therefore, of opinion that the conclusion of the learned Subordinate Judge, that Shib Sahai asserted his adverse possession as early as 1903 and that since that date his possession has been adverse, cannot be accepted It is true that the feelings between the parties were highly estranged and protracted litigation was going on It is also true that Shib Sahai apparently did not pay the plaintiff's share of the property. It is also apparent that the plaintiff did not put forward any express claim or demand in respect of it for a large number of years, but in the absence of a clear demand and a clear refusal, we cannot hold that the possession of one co-sharer became adverse as against the other. The learned Subordinate Judge has thought that this possession became adverse since the date of the denial. This denial he takes to mean as set up in the provision of the will. That, in our opinion, however, did not amount to a clear denial of the plaintiff's title. Although, therefore, there has been a great delay in the institution of the suit, we are compelled to hold that there is no satisfactory evidence, direct or circumstantial, to prove that Shib Sahai had acquired title to

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the plaintiff's half share in the joint property by exercise of adverse possession for over twelve years. The plaintiff's claim cannot, therefore, be barred by limitation.

The last point which requires consideration is which property is joint and which is the exclusive property of Shib Sahai. [The judgement then proceeded to decide this point.]

The result, therefore, is that the plaintiff's claim for the entire property by right of survivorship cannot be sustained, but his claim for a half share in the entire property in suit must be decreed We accordingly allow this appeal, and setting aside the decree of the court below, decree the plaintiff's claim for a half share in the properties mentioned in schedules A and B attached to this judgement which have been approved of and accepted by the counsel of the parties. We direct that the parties should bear their own costs in both courts.

Appeal allowed.

APPELLATE CIVIL.

Before Justice Sir Cecil Walsh and Mr Justice Banerji

ULFAT BIBI (OPPOSITE PARTY) *v* BAFATI (APPLICANT) * 1927 *March*, 23.

Muhammadan law—Guardian and minor—Rights of father as natural guardian—Act No VIII of 1890 (*Guardians and Wards Act*), *sections* 12 *and* 25

By the Muhammadan law the father is the natural lawful guardian of his minor child, until by some order of a competent court he is deprived of his rights as such, and is automatically entitled to exercise the rights of a guardian without any order of a court appointing him

The expression "guardian" used in section 25 of the Guardians and Wards Act, 1890, is not confined to statutory guardians, but includes the lawful guardian, such as the father, and the custody referred to in that section includes both constructive as well as actual custody. *Mushaf Husain* v *Mohammad Jawad* (1) and *Annie Besant* v *Narayaniah* (2), followed.

THE facts of this case are fully stated in the judgement of the Court

Babu *Satish Chandra Das*, for the appellant

The respondent was not represented

WALSH and BANERJI, JJ :—This case is a little difficult to deal with because everybody seems to have done everything he possibly could do in the matter except the right thing, but it is obvious that in this appeal we ought to try and do the right thing There is no question of law involved so far as we can understand it, and still less is there any issue of fact. A further difficulty arises owing to considerable doubt in our mind as to whether the appellant has any *locus*

* First Appeal No 125 of 1926, from an order of K A H Sams, District Judge of Benares, dated the 30th of April, 1926

(1) (1918) 21 Oudh Cases, 194 (2) (1914) I L R, 38 Mad., 807

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standi at all But we are prepared to brush aside all fine points, and to try and put the matter straight The position is that the minor has both parents living. They are Muhammadans, and by the Muhammadan law the father is the natural lawful guardian until by some order of a competent court he is deprived of his rights as such, and is automatically entitled to exercise the rights of a guardian without any order of a court appointing him, and it is correct to say, although it is irrelevant in this case, that an order appointing a person who is already by law a guardian is an order without jurisdiction But it is one of those orders without jurisdiction which, if it does no good, certainly does no harm, and, therefore, is not in itself a reason for interference by a court of appeal Side by side with the right of the father as the lawful guardian, exists the recognized right of the mother by the Muhammadan law to have the custody of the child up to the age of seven This question has already been considered and decided by the District Judge of the lower court, namely, by an order of the 26th of September, 1924 In that decision the District Judge said that the only matter was one of age and he found that the boy was still six years of age and that, therefore, the mother was entitled to the custody He went further and he fixed the date when that custody ceased by law. He found that the child would be six years old at the end of the then calendar year and that, therefore, the father had to wait till the end of the next calendar year until he was seven That would be the 31st of December, 1925 We are of opinion that the learned Judge could have treated this application as an application to enforce the order of his predecessor, namely, that the custody of the child passed to the father on the 31st of December, 1925 Unfortunately, in ignorance

apparently of the fundamental law, an ignorance which may be pardoned because we think it is very common, the pleader for the father, undoubtedly intending to act on the previous order of Mr. Harper, applied under section 10 of the Guardians and Wards Act for the appointment of the guardian It is obvious that he knew nothing about the dictum of the Privy Council, or of the case which has been cited to us from Oudh which we propose to follow, and that he really meant that the order of Mr Harper should be complied with, namely, that the custody of the child should be handed over to the father. In his very natural ignorance on the subject it would be quite the usual thing to apply for the appointment of a guardian as a preliminary step to the next step of obtaining an order for the custody No objection was raised by anybody, according to the Judge's order. That was a serious error, according to Mr. *Das*, on the part of his client She ought, being a person interested in the proper exercise of the jurisdiction of the court below, to have appeared and pointed out to the learned Judge that he had no jurisdiction to make this order. But unfortunately nobody was present to point this out. The learned Judge fell into the mistake that the pleader had originated. That is also not unnatural. These applications are dealt with, as everybody knows, summarily, and, one may say, somewhat expeditiously, on Saturday morning, when something like a hundred of one sort or another are rushed through with very little time to devote to them, certainly not the time which we have already devoted to this appeal. But the learned Judge obviously intended to follow his predecessor's order He says so, and he falls into a technical trap of passing an order which, strictly speaking, he had no jurisdiction to pass, namely,

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to appoint the applicant guardian, because the boy was then over seven years of age. What he ought to have done was to have said that the mother was no longer entitled to the custody and that the father was, and, if necessary, to have called the mother before him and ordered her personally to hand over the boy. That is really the only way in which these orders can be carried out, because if the person who has the custody of the child disobeys that order, he or she can be punished for disobedience of the order. We do not see any difficulty in the framing of the Act in making such an order, for example, the father might have applied, as he did apply, to the learned Judge under section 10 to be appointed guardian, and the Judge might have said —"I cannot do that because I have no jurisdiction to appoint you guardian as you are already guardian, but I will make an order under section 12 which the Act enables me to do for the temporary custody of the person of the minor, and I will hand him over to you and then if anybody wants to deprive you of the custody of the boy in future time, he will have to appear before me and show good cause" But equally he might have done what we propose to do, namely, follow the decision of Mr. Justice LINDSAY in the case of *Mushaf Husain* v *Mohammad Jawad* (1) Following the decision of the Privy Council in the Madras case, *Annie Besant* v *Narayaniah* (2), he held that there was no power to appoint the father guardian, but he also held that the expression "guardian" used in section 25 was not confined to statutory guardians, but included the lawful guardian, such as the father, and that the custody referred to in section 25 included both constructive as well as actual custody That is a very ingenious mode of getting out of the difficulty, because there is a real difficulty in the wording of section 25

(1) (1913) 21 Oudh Cases, 194 (2) (1914) I.L.R., 38 Mad., 807

which only comes into operation if the ward leaves or is removed from the custody of a guardian, and it is obvious that if a ward remains in the custody of his mother, however unlawfully, he does not leave the custody of his father, and, therefore, in a case like this the section does not work at all The judicial interpretation has taken a merciful view of the matter so as to prevent the courts being rendered powerless and has treated the custody mentioned in section 25 as constructive custody The result is that this boy is the ward of his lawful guardian. The order ought not to have appointed the father guardian, but inasmuch as the father is the lawful guardian and entitled to the custody of the boy, he has, in accordance with the judicial view, the constructive custody of the boy, although the boy in fact remains in the physical possession of the wife Once the section is brought into play in that way there is no difficulty in the court making an order which we propose to make under section 25, directing that the boy be placed or taken into the custody of the father, and the appellant must understand that if she does not within fifteen days from today hand over the custody of the child to the father, notice will be issued against her for contempt of court and she will be summoned before us and dealt with according to law for disobedience of that order.

That leaves one question undisposed of. Mr *Das* rightly pointed out that if section 25 is brought into play the court is then bound to consider the welfare of the child As this matter was dealt with *ex parte* in the court below and the court was not conscious of its failure to appreciate the proper machinery, its attention was not drawn to section 25. We have no doubt whatever that it is in the interests of the minor *primâ facie*, and upon the facts as they are known

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to us, that the father should have the custody We know nothing against him, nothing has been alleged against him. There is nothing in law to prevent a proper application being made on proper grounds to deprive him of the custody of his young son, but, at any rate, it would have to be made out by somebody who was able to show that he was a more suitable person than the father. We are of opinion that a woman who has been divorced, if this appellant has been divorced, and has married a second husband, is not a person either herself better suited than the father, however unsuitable the father may be, and not a person who ought to be heard to say that the father is unsuitable She has abandoned her home and husband either by her own free will, or as the result of her conduct, and in the eyes of the law she has lost the right to assert a claim against the father for the child and probably the right to assert this appeal We have, however, thought it necessary to deal with the matter as it is before us in order to assist the court below in the event of any further circumstances arising which require the matter to be dealt with again, and to correct the point which Mr *Das* was right in drawing our attention to, as on the face of it the order was one which the court has no jurisdiction to make The appeal must be dismissed

Appeal dismissed.

Before Mr Justice Lindsay and Mr Justice Sulaiman

JAVITRI (DEFENDANT) *v* GENDAN SINGH AND OTHERS (PLAINTIFFS).* 1927 March, 23.

Hindu law—Deed of gift in favour of widows—Interpretation of document—Nature of interest conveyed—Stridhan—Suit by reversioners—Burden of proof as to nearness

It is incumbent on a plaintiff seeking to succeed to property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the court that to the best of his knowledge there are no nearer heirs He cannot be expected to do anything more, and it is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship *Rama Row* v. *Kuttiya Goundan* (1), followed

One *SR*, about a year before his death, executed a deed of gift by which he divided a certain village between his two wives, giving one-quarter to the senior wife and three-quarters to the junior wife After *SR's* death the widows took possession of the village and divided it between them, but not in the proportions set forth in the deed of gift Thereafter the senior widow is said to have given her share to her daughter's son The junior widow was succeeded as to her share by her daughter and then by her daughter's daughter, *J* In *J's* lifetime the reversioners to *SR* sued for possession and obtained a decree *J* appealed, but died pending the appeal, and her sons were brought on the record in her place

In appeal—the original deed of gift being construed (as in the first court) as conveying only a life-interest—it was *held* that the plaintiffs were entitled to succeed But even if the gift had been absolute, as matters stood when the appeal came on for hearing—*J* being dead and having left no female heir—the plaintiffs would still be entitled to their decree *Sheo Shankar Lal* v *Debi Sahai* (2), *Sheo Partab Bahadur Singh* v *The Allahabad Bank* (3), *Subrahmanian Chetti* v. *Arunachelam Chetti* (4), *Sham Bihari Lal* v *Ram Kali* (5) and *Ram Kali* v *Gopal Dei* (6), referred to

* First Appeal No 211 of 1924, from a decree of Kashi Prasad, Additional Subordinate Judge of Aligarh, dated the 29th of March, 1924

(1) (1916) I L R , 40 Mad , 654 (2) (1903) I L R , 25 All , 468
(3) (1903) I L R , 25 All , 476 (4) (1904) I L R , 28 Mad , 1
(5) (1923) I L R , 45 All , 715 (6) (1926) I L R , 48 All , 648

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THE facts of this case are fully stated in the judgement of the Court

Mr *B. E. O'Conor*, Dr *Surendra Nath Sen*, Maulvi *Mushtaq Ahmad* and Munshi *Ram Nama Prasad*, for the appellant

Sir *Tej Bahadur Sapru*, Pandit *Shiam Krishna Dar* and Munshi *Panna Lal*, for the respondents.

LINDSAY and SULAIMAN, JJ. —The dispute in this case is with regard to certain zamindari property in a village called Nagla Anni. Admittedly this property once belonged to a man named Suchcha Ram who died in 1870. In the plaint there is exhibited a pedigree about which, except in one particular, there was no dispute in the court below, and from this it appears that Suchcha Ram had two wives, Musammat Nand Kunwar, the elder wife, and Musammat Gias Kunwar, the younger.

The plaintiffs in the present suit are the daughter's grandsons and great-grandsons of Suchcha Ram through his wife Musammat Nand Kunwar.

The sole defendant in the suit was Musammat Javitri, who was Suchcha Ram's grand-daughter, the daughter of his daughter Musammat Parbati. In other words, Javitri was the grand-daughter of Suchcha Ram's younger wife, Musammat Gias Kunwar.

The case for the plaintiffs was that on the death of Musammat Parbati, in 1922, the succession opened and the property devolved upon them as the nearest *bandhus* of Suchcha Ram. It was alleged in paragraph 9 of the plaint that there were no other heirs of Suchcha Ram than the plaintiffs.

It was admitted in the plaint that on the 5th of February, 1869, about a year before his death, Suchcha

Ram had executed a deed of gift by which he purported to give 5 biswas of Nagla Anni to his wife Musammat Nand Kunwar and the remaining 15 biswas to his second wife Musammat Gias Kunwar. The plaintiffs, however, maintain that this deed was not given effect to and that the two widows succeeded as joint heirs of their husband after his death in the year 1870 After Suchcha Ram's death, by a deed executed on the 24th of May, 1870, the two widows divided the property, one-third being assigned to Musammat Nand Kunwar and two-thirds to Musammat Gias Kunwar. After this it is said that Musammat Nand Kunwar made a gift of her one-third share to her daughter's son, Narain Singh The two-thirds share, which was in the possession of Musammat Gias Kunwar, descended to her daughter Musammat Parbati and it was stated that in the year 1878, by partition arranged between Narain Singh on the one side and Parbati on the other, two *mahals* were constituted, one of Narain Singh and one of Musammat Parbati, in accordance with the shares above specified It was, however, claimed that neither Musammat Gias Kunwar nor Musammat Parbati had more than the limited estate of Hindu females in the shares just mentioned, and the plaintiffs, therefore, claimed that they were entitled to succeed on the death of Musammat Parbati Musammat Javitri, it was pleaded, had no right to take the property after Parbati's death

The defence in substance was that the gift made by Suchcha Ram in the year 1869 conferred an absolute estate on both the widows and consequently it was pleaded that the share which was given to Musammat Gias Kunwar was her *stridhan* property which had rightly descended in the first instance to Musammat Parbati and after the latter's death to

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Musammat Javitri The defendant pleaded that the plaintiffs were not the heirs of Suchcha Ram, though she did not set up any plea of *jus tertii* A further plea taken in defence was one of adverse possession, it being alleged that Parbati held adversely since the death of Musammat Gias in the year 1875 and so it was pleaded that the plaintiffs' suit was barred by limitation Again in paragraph 21 of the written statement a reference was made to the partition which took place in 1878 between Narain Singh and Musammat Parbati and it was pleaded that in view of this partition the plaintiffs had no right to recover the property in suit

The Subordinate Judge decreed the suit He found that the deed of gift executed by Suchcha Ram on the 5th of February, 1869, could at most confer only a life-interest on Musammat Gias He also found that no effect was given to this deed because no mutation took place after it had been executed The Subordinate Judge was further of opinion that Gias's interest, after the arrangement entered into in 1870 with her co-widow, Musammat Nand Kunwar, was still only a life-interest in the property He held that Parbati's possession was not adverse to the plaintiffs, for she succeeded as heir to her father on the death of the last surviving widow, Musammat Nand Kunwar, who died in the year 1878. He found that the plaintiffs could only bring their suit after Parbati's death. He was of opinion that the plaintiffs were the nearest heirs of Suchcha Ram and that it was not proved that there were any nearer heirs in existence

Against this decree Musammat Javitri appealed. She died during the pendency of the appeal It appears that Javitri left several sons but no daughter,

and the sons have been allowed to continue the appeal after the death of their mother. We have to note here that objection was taken to this substitution of parties on the ground that even if the property had, as alleged by the defendant, been the *stridhan* property of Musammat Gias, Musammat Javitri's sons could not inherit it and the property would revert to the heirs of the last full owner. This objection was withdrawn and obviously could not be maintained, for the question of the sons' right to take the property which was in Javitri's possession could only be decided after they were made parties to the appeal.

The first ground taken in the petition of appeal is that the plaintiffs have failed to prove themselves to be the nearest heirs of Suchcha Ram. Grounds 2 and 3 relate to the deed of gift executed by Suchcha Ram on the 5th of February, 1869. It is pleaded that by this transfer Musammat Gias took an absolute estate in the property. In grounds 5 and 6 it was pleaded that the property being the *stridhan* of Musammat Gias had rightly descended to Musammat Javitri. The fourth ground of appeal relating to a question of fact has not been pressed before us and may be ignored.

To deal with the first ground raised in the memorandum of appeal.

The plaintiffs are admittedly *bandhus* of Suchcha Ram and they are entitled to succeed to any property which was Suchcha Ram's estate in the absence of agnate relations, that is to say, *sapindas* and *samanodakas* to the 14th degree from Suchcha Ram. It is claimed here in appeal that the plaintiffs failed to discharge the burden of proof which lay upon them. They alleged in their plaint the absence of all other heirs except themselves but they produced no evidence

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None of the plaintiffs went into the witness-box and from the record it is proved that the plaintiffs' pleader refused to open the case and to lead evidence He said he would content himself with calling evidence in rebuttal

As regards the burden of proof the plaintiffs had in the first place to prove themselves *bandhus* and this they have done They had also to satisfy the court that there were no nearer heirs, and the question is whether there is any evidence on the record on this point The Subordinate Judge held that the plaintiffs had proved all that was necessary for them to prove because, as he said, it is not proved that any collateral of Suchcha Ram deceased is alive While we do not think that the view of the Subordinate Judge on this point is quite correct, we are nevertheless of opinion that the plaintiffs did discharge the burden which lay upon them In this connexion we may refer to the case of *Rama Row* v *Kuttiya Goundan* (1) At page 656 of the report, dealing with the question of burden of proof in a case of this kind, one of the learned Judges observed :—

"It is no doubt incumbent on a plaintiff seeking to succeed to property as a reversioner, to establish affirmatively the particular relationship which he puts forward He is also bound to satisfy the court that to the best of his knowledge there are no nearer heirs He cannot be expected to do anything more It is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship"

We think that this, if we may say so, is a correct statement of the law relating to burden of proof in a case of this nature. Now, while it is true that the plaintiffs did not lead any evidence for the purpose of showing that to the best of their knowledge there were no nearer heirs than themselves, they are entitled to rely upon any evidence to this effect which can be

(1) (1916) I L R , 40 Mad , 654

found in the statements of any of the witnesses called for the defence, and reliance is placed upon the statement of a defendant's witness, a man named Mihin Lal, a patwari His deposition is printed at pages 10 and 11 of the record, and it is shown that in cross-examination Mihin Lal admitted that there was now no one alive in the family of Suchcha Ram. We think that the plaintiffs are entitled to rely upon this statement, and that being so, we are of opinion that the burden of proof was discharged and that the plaintiffs proved themselves to be the nearest heirs of Suchcha Ram

The next question we have to deal with is the interpretation of the deed of gift executed by Suchcha Ram on the 5th of February, 1869 After having carefully considered this matter in the light of the arguments addressed to us we do not feel disposed to differ from the opinion come to by the court below namely, that this deed gave nothing more than a life interest in the property to the two widows

The deed begins by reciting that Suchcha Ram is the owner of the whole 20 biswas in mauza Nagla Anni, and he goes on to say that, being in a sound state of mind, he has made a gift of the property with all its inherent and adventitious rights to his wives Musammat Gias Kunwar and Nand Kunwar in the proportion of 15 biswas to the former and 5 biswas to the latter. It is also recited that the donor has withdrawn his possession and has put the donees in possession. Suchcha Ram goes on to say that the donees, while in possession and occupation of the gifted property, shall be "responsible for loss or gain" (malik nafa wa nuqsan) The next recital is that neither he nor his heirs shall have any claim whatsoever with regard to the subject matter of the gift, and finally there is a declaration that the donees shall have no right to alienate this property.

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It is true that if the earlier portion of this document stood alone it might be very difficult to suggest that the gift was not an absolute gift. There is, however, the clause at the end in which it is expressly recited that the donees are to have no right to alienate this property, and if effect is to be given to these words, it necessarily follows that we must hold, in agreement with the court below, that the two widows took nothing more than the limited estate peculiar to Hindu females. We were asked by the respondents to interpret this document in the light of the principles laid down in the Privy Council case of *Shumsool Hooder* v *Shewukram* (1). Certainly if those principles are to be adopted here in connexion with this deed which was executed in the year 1869, our finding must be in favour of the respondents. The only other course would be to rule out the clause forbidding alienaction as being repugnant and of no effect. On the whole we certainly think it possible to interpret this document as conferring a limited interest only and we are not prepared to say that the judgement of the Subordinate Judge on this point is wrong. On this finding, therefore, the judgement of the court below must be held to be correct, and the plaintiffs being the nearest heirs of Suchcha Ram were entitled to succeed on the death of Parbati.

As regards the plea of adverse possession on the part of Parbati which was raised in the court below, we are of opinion that no such plea can succeed. There is no question of Musammat Parbati's possession having been adverse to the plaintiffs, who only became entitled to set up their claim when succession opened after Parbati's death.

We may further observe here that, as matters now stand, we should feel ourselves compelled to affirm the

(1) (1874) 14 B L R, 226 (231).

lower court's decree even if it were held in favour of the appellant that Musammat Gias took an absolute interest under the deed of gift executed by Suchcha Ram If Musammat Gias took an absolute interest as the appellant contends, then the property became Gias's *stridhan* and would descend first to her daughter Musammat Parbati for her life and afterwards to her daughter Musammat Javitri for her life We have mentioned above that Javitri died pending this appeal and left no daughter but only sons, and so there is now a reverter to the heirs of Musammat Gias, namely, Gias's husband and his heirs In this connexion we refer to the two judgements of their Lordships of the Privy Council, *Sheo Shankar Lal* v *Debi Sahai* (1) and *Sheo Partab Bahadur Singh* v *The Allahabad Bank* (2) We also refer to the interpretation which was put on these judgements in the Full Bench case of the Madras High Court, *Subrahmanian Chetti* v *Arunachalam Chetti* (3) This latter interpretation has been accepted in two cases in this Court. namely, *Sham Bihari Lal* v *Ram Kali* (4) and *Ram Kali* v *Gopal Dei* (5). Since the decree was passed in the court below, execution has been taken out and possession has been delivered to the plaintiff and now that Musammat Javitri is dead and her sons cannot take this property (on the assumption that it was the *stridhan* property of Musammat Gias), it would not be proper to hand back the property to Javitri's sons and thus to invite the parties to embark upon another litigation. In any view the plaintiffs are nearer heirs than the sons of Javitri, for the former are daughter's son's sons while the latter are daughter's daughter's sons

(1) (1903) I L R , 25 All , 468 (2) (1903) I L R , 25 All , 476
(3) (1904) I L R , 28 Mad , 1 (4) (1923) I L R , 45 All , 715
(5) (1926) I L R , 48 All , 648

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There remains for consideration only one other argument which was pressed upon us in appeal It was contended on behalf of the defendant appellant that there had been a family settlement which bound the parties and which constituted a bar to the present claim There is in reality before us no case of family settlement nor was any such case set up in the court below. [The judgement then referred to certain evidence and concluded as follows:—] There was no family settlement which would bar the present suit.

The appeal, therefore, fails, but we modify the decree of the court below by directing that the parties do bear their own costs in the court below In this Court also they will bear their own costs.

Appeal dismissed.

Before Justice Sir Cecil Walsh and Mr Justice Banerji

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MOHAN LAL (JUDGEMENT-DEBTOR) *v* KALI CHARAN (DECREE-HOLDER) AND NIRANJAN LAL AND ANOTHER (AUCTION-PURCHASERS) *

Civil Procedure Code, order XXI, rules 66 and 90—Execution of decree—Application by judgement-debtor to set aside sale on the ground of inaccuracy of the sale proclamation

Held that it is not open to a judgement-debtor, when making an application under order XXI, rule 90, of the Code of Civil Procedure, to object to the sale proclamation upon the ground that certain material entries therein were incorrect, when he might have impugned its accuracy when notice was sent to him under rule 66 (2)

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Panna Lal*, for the appellant

* First Appeal No 142 of 1926, from an order of Syed Iftikhar Husain, Subordinate Judge of Budaun, dated the 6th of July, 1926

Munshi *Harnandan Prasad* and Munshi *Shambhu Nath Seth*, for the respondents.

WALSH and BANERJI, JJ :—This is a judgement-debtor's appeal against an order of the learned Subordinate Judge of Budaun dismissing his application to set aside a sale.

The facts of this case are that a decree was passed in favour of Lieut. Raja Kali Charan against the appellant, Lala Mohan Lal. In execution of that decree certain property was put up for sale on the 20th of April, 1926. On the 17th of April, 1926, an application was presented, signed by the judgement-debtor and the decree-holder, praying that the sale fixed for the 20th be postponed for a month and that it was unnecessary to publish a fresh proclamation for sale. Upon the application being put up, the decree-holder's pleader stated that if fresh proceedings had to be taken he did not consent to the sale being postponed. However, the Judge declined to postpone the sale. At the sale the property was bid for by Niranjan Lal, but Niranjan Lal had the names of himself and Indar Prasad recorded by the sale officer as the purchasers of the property. On the 27th of April, 1926, an application was filed under order XXI, rule 90, of the Code of Civil Procedure by the appellant, Lala Mohan Lal, and he stated in the application the fact of time having been given by the decree-holder, and he being a resident of Bareilly thought that the sale would be postponed and, therefore, he could not attend the court at Budaun; that there were serious irregularities in the conduct of the sale and that certain encumbrances were notified to be on the property which were contrary to facts, that the property was worth Rs 10,000 and its approximate value was Rs. 7,279-11-0 and the sale having

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taken place for a sum of Rs. 2,150, the price was very low. There were various other allegations about irregularities in the sale proceeding. The auction-purchaser opposed this application and the learned Judge of the court below dismissed the application on the ground that in his application under order XXI, rule 90, the judgement-debtor had impleaded one and not both the auction-purchasers. It has been urged by the advocate for the appellant that under order XXI, rule 90, it was unnecessary to mention the name of the auction-purchasers. All that was incumbent on the court hearing the application was that it should direct notice of the application to be issued to the auction-purchasers, and it was no part of the duty of the judgement-debtor to name in his application all the auction-purchasers His contention further was that the case of *Karamat Khan* v. *Mir Ali Ahmad* (1) and that of *Ali Gauhar Khan* v *Bansidhar* (2) were no longer good law in view of the provisions of the Code now. It is unnecessary to decide the question, as the matter, in our opinion, must be decided on another point.

The learned vakil for the respondent has supported the order of the learned Subordinate Judge on the ground that it was not open to the judgement-debtor to come forward and challenge the details entered in the sale proclamation, as he, upon the notice which was issued to him under rule 66, ought to have appeared before the court and brought to the notice of the court that there were incorrect statements in that proclamation

The other points raised by the judgement-debtor have all been found by the court below to be incorrect, namely, that there were no irregularities as alleged by the judgement-debtor The court below had no

(1) Weekly Notes, 1891, p 121 (2) (1893) I L R, 15 All, 407

doubt come to the conclusion that the property sold was free from encumbrances but that encumbrances had been notified in the sale proclamation. He says :—

"The property put to sale was 2 biswas out of 5 biswas 4 biswansis and odd Two encumbrances of the 30th of September and the 27th of October, 1920, were notified This property is of *patti* Ram Prasad, *Khata Khewat* No 9. The 4 biswansis only of this *patti* are mortgaged in the bond of the 30th of September and 3 biswansis are mortgaged in the bond of the 27th of October They have a burden over 3 biswas and 4 biswansis only After deducting 2 biswas to be sold in this decree there remain more than 3 biswas and 4 biswansis When property can be assigned to all the mortgages without overlapping the share mortgaged in any one of them, the property mortgaged in one bond cannot be said to be mortgaged in the other"

We have come to the conclusion that the judgement-debtor cannot raise this question inasmuch as it was open to him to point out to the court that the encumbrances, as mentioned by the decree-holder and certified to by the registration office, ought not to be entered in the sale proclamation, as it was possible to assign different portions of the property to the different mortgages In the absence of the judgement-debtor it was impossible for either the court or the decree-holder to find out whether the property now sold was or was not subject to the two other mortgages The law has been now made clear by the additions to rule 90 made by the rules framed by this Court under the rule-making powers, but those rules do not govern the facts of the present case; but we see no reason to hold that the law was any different from what the law has now been declared by the rules to be the law applicable to such cases

We are, therefore, of opinion that this appeal must fail and we dismiss it with costs

Appeal dismissed

REVISIONAL CRIMINAL.

Before Mr Justice Iqbal Ahmad

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NARAIN DAS *v.* EMPEROR *

Criminal Procedure Code, sections 195 (1) (b) *and* (c) *and* 476 *—Complaint made by a court—Competence of trial court not affected by the fact of the parties concerned having compromised in appeal—Act No. XII of* 1887 *(Bengal, Agra and Assam Civil Courts Act), sections* 21 (1) *and* 8.

If it appears to a court that any of the offences enumerated in section 195 (1) (*b*) and (*c*) of the Code of Criminal Procedure have been committed "in or in relation to a proceeding in that court," it has jurisdiction to proceed under section 476 of the Code The mere fact that in the appellate court the parties agreed to compromise the matter, or to get it decided by a reference to arbitration, or in accordance with the statement of a referee, cannot take away the jurisdiction vested in the trial court to make a complaint under section 476 of the Code of Criminal Procedure, provided that court is satisfied that "it is expedient in the interests of justice that such a complaint should be made"

The proceedings taken by a civil court under section 476 of the Code of Criminal Procedure are to be deemed as proceedings of a civil nature and are, therefore, governed by the rules relating to civil cases By section 8 of the Civil Courts Act (XII of 1887) an Additional Judge is competent to discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions the Additional Judge is competent to exercise the same powers as the District Judge

Mutasaddi Lal v *Mule Mal* (1), *Ram Charan* v *Mewa Ram* (2) and *Banwari Lal* v *Jhunka* (3), followed *Ram Charan Chanda Talukdar* v *Tarapulla* (4), *Hari Mandal* v *Keshab Chandra Mana* (5) and *Rajdhari Lal* v *Rameshar Lal* (6), referred to

THE facts of this case are very fully stated in the judgement of the Court

*Criminal Revision No 34 of 1927, from an order of Raghunath Prasad, Sessions Judge of Meerut, dated the 10th of January, 1927

(1) (1912) I L R, 34 All, 205
(2) (1921) I L R, 43 All 409
(3) (1925) 24 A L J, 217
(4) (1912) I L R, 39 Calc, 774
(5) (1912) I L R, 40 Calc, 37
(6) (1927) I L R, 49 All, 460

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Sir *Tej Bahadur Sapru* and Mr. *P. N. Sapru*, for the applicant.

The Assistant Government Advocate (Dr. *M Wali-ullah*), for the Crown.

IQBAL AHMAD, J. —This criminal revision and Criminal Revisions Nos. 35 and 36 of 1927 are connected and arise out of one and the same case The applicants in all the three cases were convicted by a Magistrate of the first class under section 193 of the Indian Penal Code, and Narain Das, applicant in Criminal Revision No 34 of 1927, was sentenced to six months' rigorous imprisonment and to a fine of Rs. 200, and Chuttan Lal and Nand Kishore, the applicants in the other two cases, were sentenced to three months' rigorous imprisonment and to a fine of Rs 100 each The conviction and the sentences passed on the applicants have been upheld by the learned Sessions Judge.

Narain Das applicant is a resident of village Pilakhwa and is a substantial zamindar and moneylender. In the same village resides another zamindar named Nathu Mal. The case for the prosecution was that on the 1st of February, 1925, Nathu Mal agreed to sell to Narain Das 35 bighas 6 biswas of land in a certain village for Rs. 6,500, but for fear of preemption it was agreed between Narain Das and Nathu Mal that in the sale-deed Rs 8,000 was to be stated as sale consideration After the agreement for sale had been entered into, Ganpat Rai, mukhtar-i-am of Nathu Mal, went to Meerut to purchase and did purchase a stamp paper of sufficient value on which a sale-deed for a sum of Rs 8,000 could be executed On the 3rd of February, 1925, both Narain Das and Nathu Mal went to Ghaziabad and it is said that Narain Das asked Nathu Mal to give him a pro note

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for Rs. 1,500, viz., the difference between the real and the bogus price before the execution of the sale-deed, and accordingly Nathu Mal passed a pro-note duly signed by him for the said amount in favour of Narain Das, but ante-dated the same to the 25th of January, 1925 A draft of the sale-deed was also prepared It is alleged that Narain Das then went to consult his local lawyer, Babu Duli Chand, and took with him the pro-note, the stamp paper and the draft of the sale-deed When Narain Das did not return, Nathu Mal went in search of him and was informed that Narain Das had left for his village Nathu Mal followed Narain Das and found him in the village and asked him either to have the sale-deed executed or to return the pro-note. It is said that Narain Das put off the matter and did not get the sale-deed executed nor returned the pro-note Then Nathu Mal reported the matter to the District Magistrate, but the District Magistrate took no action and directed Nathu Mal either to file a civil suit or to make a formal complaint in a criminal court. Nathu Mal then went to Ghaziabad and filed a civil suit in the court of the Munsif on the 5th or 6th of February, 1925, for a declaration that the pro-note, dated the 25th of January, 1925, was without consideration.

Narain Das contested the suit on the ground that he had money dealings with Nathu Mal for a long time and that the pro-note was for consideration, and that there was no contract for sale as alleged by Nathu Mal, and that he being a co-sharer in the village could not be afraid of pre-emption, and, therefore, there was no occasion to get an inflated price entered in the sale-deed. He stated that about one and a half years prior to the institution of the civil suit one of his servants had filed a complaint against one Dwarka Das, son-in-law of Nathu

Mal, and Dwarka Das was convicted in that case by the trial court, but the case was compromised in the appellate court, and Narain Das's case was that Dwarka Das thought that Narain Das was really at the bottom of that case, and it was he (Dwarka Das) who persuaded Nathu Mal to concoct the story that the pro-note was without consideration The civil suit was tried by Mr Kedar Nath, Munsif He disbelieved the statements of Narain Das and of Chuttan Lal and of Nand Kishore who stated that the pro-note was for consideration, and overruled the pleas urged in defence, and passed a decree in favour of Nathu Mal in terms of the reliefs prayed for in the plaint, on the 2nd of June, 1925 Narain Das filed an appeal against the decree in the court of the District Judge During the pendency of the appeal the parties agreed to refer the dispute between them to the arbitration of one Bakhtawar Singh The arbitrator gave an award in favour of Nathu Mal on the 26th of February, 1926 Narain Das filed objections to the award on the 9th of March, 1926, but those objections were dismissed for default on the 27th of March, 1926 On the 22nd of April, 1926, Narain Das applied for setting aside of the order of dismissal for default, and during the pendency of this application the parties agreed to abide by the oath of one Umrao Singh On the 7th of June, 1926, Umrao Singh made a statement on oath to the effect that the pro-note was not for consideration. Because of the statement of Umrao Singh the application for restoration was dismissed on the 7th of June, 1926.

On the 17th of June, 1926, Nathu Mal filed applications in the court of the Munsif of Ghaziabad under section 476 of the Code of Criminal Procedure, praying that the Munsif should make complaints against Narain Das, Chuttan Lal and Nand Kishore

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applicants under section 193 of the Indian Penal Code. These applications were heard by Mr. Daya Nand Joshi who had succeeded Mr Kedar Nath, Munsif. He granted the application against Narain Das but rejected the applications against the other two applicants noted above Both Nathu Mal and Narain Das filed appeals in the court of the District Judge. Narain Das's appeal was heard by the District Judge and was dismissed. Nathu Mal's appeal was transferred to the court of the Additional Judge which was presided over by Mr Shambhu Nath Dube. Mr. Shambhu Nath Dube allowed the appeal of Nathu Mal and directed the institution of complaints against Chuttan Lal and Nand Kishore for an offence punishable under section 193 of the Indian Penal Code

All the three applicants, as already stated, have been found guilty and have been convicted

In revision before me certain facts were relied upon by the learned counsel for the applicants with a view to show that the story of Nathu Mal was improbable and should not have been believed As there was ample material upon the record to justify the findings of fact arrived at by the learned Sessions Judge, I cannot go into the evidence and interfere with those findings, and I must accept the same as binding on me

But it is argued that inasmuch as the appellate court had decided the case in accordance with the statement of a referee, the learned Munsif had no jurisdiction to proceed under section 476 of the Code of Criminal Procedure It is pointed out that the fact of the parties agreeing to abide by the oath of a referee precluded a judicial consideration by the appellate court of the evidence in the civil suit, and

the statement of the referee was in view of the provisions of section 11 of the Oaths Act (Act X of 1873) to be treated as conclusive In short, it is argued that the judgement of the learned Munsif should be deemed to have been discharged, and the suit having terminated by the statement of a referee, the courts below had no jurisdiction to make a complaint for an offence punishable under section 193 of the Indian Penal Code. I am unable to agree with this contention. The offence of perjury was committed in a proceeding in the court of the Munsif of Ghaziabad and as such that court was fully competent to proceed under section 476 of the Code of Criminal Procedure If it appears to a court that any of the offences enumerated in section 195 (1) (*b*) and (*c*) have been committed " in or in relation to a proceeding in that court, " it has jurisdiction to proceed under section 476 of the Code of Criminal Procedure. The mere fact that in the appellate court the parties agreed to compromise the matter, or to get it decided by a reference to arbitration, or in accordance with the statement of a referee, cannot take away the jurisdiction vested in the trial court to make a complaint under section 476 of the Code of Criminal Procedure, provided that court is satisfied that " it is expedient in the interests of justice that such a complaint should be made " At the same time there is much to be said in favour of the contention advanced on behalf of the applicants that in the circumstances of this case either a complaint should not have been made against the applicants or, if made, Nathu Mal should also have been prosecuted Nathu Mal, on his own showing, was, by ante-dating a fictitious pro-note with the intention of causing loss to a possible pre-emptor, guilty of having committed forgery In short, both Nathu Mal and Narain Das

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had conspired to bring into existence a false document for the purpose of defeating the just rights of any co-sharer who was inclined to assert his right of pre-emption, and if the sale-deed had been executed and a pre-emption suit had been filed, one would not have been surprised to find Nathu Mal testifying to the fact that the pro-note was supported by consideration Moreover, the dispute between the parties having terminated by the statement of a referee appointed by them, I cannot hold that Nathu Mal could have asked for the prosecution of the applicants in the interests of purity of administration of justice Further, in this connexion I cannot overlook the fact that the learned Munsif who tried the suit did not initiate proceedings under section 476 of the Code of Criminal Procedure However, the applicants have been prosecuted and convicted and it is sufficient to say that the question of propriety of the prosecution of the applicants has been urged at a very late stage of the case It ought to have been taken up at the time when the order for the prosecution of the applicants was passed Once that order was passed the Magistrate had jurisdiction to try the case But I will take the matters referred to above into consideration in awarding the sentences passed on the applicants

As already stated above, the learned Munsif rejected the application of Nathu Mal and declined to make a complaint against Chuttan Lal and Nand Kishore, but on appeal the learned Additional Judge made complaints against them under section 193 of the Indian Penal Code. It is argued on behalf of Chuttan Lal and Nand Kishore that the learned Additional Judge had no jurisdiction to make a complaint and in this connexion my attention has been drawn to sub-clause (*b*) of clause (1) of section 195

and to sub-clause (3) of section 195 and to section 476B of the Code of Criminal Procedure. It is pointed out that a complaint for an offence punishable under any of the sections of the Indian Penal Code enumerated in section 195 (1) (*b*) of the Code of Criminal Procedure, could be made either by the Munsif of Ghaziabad or by the court to which that court was subordinate within the meaning of clause (3) of section 195 of the Code of Criminal Procedure, viz., the court "to which appeals ordinarily lie from the appealable decrees or sentences of" the court of the Munsif. It is urged that in view of the provisions of section 21 (1) of the Bengal, Agra and Assam Civil Courts Act (Act XII of 1887) appeals against the decrees of Munsifs ordinarily lie to the court of the District Judge, and as such no other court except the court of the District Judge had jurisdiction to make a complaint against Chuttan Lal and Nand Kishore. In support of this argument reliance has been placed on the cases of *Ram Charan Chanda Talukdar* v. *Taripulla* (1), *Hari Mandal* v. *Keshab Chandra Mana* (2) and *Rajdhari Lal* v. *Rameshar Lal* (3). I am unable to agree with the contention of the learned counsel for the applicants. It is true that under section 476 of the Code of Criminal Procedure, the order of the learned Munsif refusing to make a complaint could be challenged only in the court to which an appeal ordinarily lies from the appealable decrees of the Munsif, i.e., in the court of the District Judge. But it is to be remembered that, in view of the decision in *Banwari Lal* v. *Jhunka* (4), the proceedings taken by a civil court under section 476 of the Code of Criminal Procedure are to be deemed as proceedings of a civil nature and are,

(1) (1912) I.L.R. 39 Calc. 774 (2) (1912) I.L.R. 40 Calc. 37
(3) (1927) I.L.R. 49 All. 460 (4) (1925) 24 A.L.J. 217

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therefore, governed by the rules relating to civil cases. By section 8 of the Civil Courts Act (Act XII of 1887) an Additional Judge is competent to discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions the Additional Judge is competent to exercise the same powers as the District Judge.

If the District Judge was competent to make a complaint against Chuttan Lal and Nand Kishore, the Additional Judge, to whom the District Judge transferred the appeals filed by Nathu Mal, was equally competent to make a complaint. For these reasons I am unable, with all respect, to agree with the view taken in the cases relied on by the learned counsel for the appellant. The view I take is in consonance with the view taken in the cases of *Mutasaddi Lal* v. *Mule Mal* (1) and *Ram Charan* v. *Mewa Ram* (2). I hold that the learned Additional Judge had jurisdiction to make complaints against Chuttan Lal and Nand Kishore

In considering the question of sentences passed on the applicants I cannot overlook the fact that, for the reasons already assigned, I would have been reluctant to lend the weight of judicial authority to complaints against the applicants on the application of Nathu Mal, and as such I have come to the conclusion that I must not send the applicants back to jail At the same time, taking into consideration the nature of the offence committed by the applicants and particularly by Narain Das, I must enhance the amount of fines imposed on them.

Accordingly I reduce the sentence of imprisonment passed on all the applicants to the term already

(1) (1912) I L R , 34 All., 205 (2) (1921) I L R , 43 All., 409

undergone by them but enhance the fines imposed on Narain Das from Rs. 200 to Rs. 500 and on Chuttan Lal and Nand Kishore from Rs. 100 to Rs 125 In default of payment of fine Narain Das will undergo rigorous imprisonment for a period of six months and Chuttan Lal and Nand Kishore will undergo rigorous imprisonment for three months If the applicants pay the fines imposed on them they need not surrender to their bail which will stand cancelled the moment the fines are paid. With this modification in the sentences passed on the three applicants I reject the three applications.

Applications rejected.

APPELLATE CIVIL.

Before Mr. Justice Boys and Mr Justice Kendall

PHUL SINGH (DEFENDANT) *v* BHOJRAJ AND OTHERS (PLAINTIFFS) AND JANG BAHADUR SINGH (DEFENDANT) * * 1927 *March*, 29

Act No IX of 1908 (*Indian Limitation Act*), *section* 19—*Acknowledgement—Suit on a mortgage of joint family property—Acknowledgement of liability contained in a reference to arbitration and an award.*

The managing member of a joint Hindu family executed in 1902 a simple mortgage of some of the joint family property Thereafter, the members of the family being in doubt as to how the liability under this mortgage should be distributed amongst them agreed to refer the question to arbitration and an award was made setting forth the proportions in which each member of the family was liable This was in 1910 In 1922 the representatives of the original mortgagee instituted a suit for sale on the mortgage of 1902

*Second Appeal No 1913 of 1924, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Farrukhabad, dated the 20th of October 1924 confirming a decree of M O Rainey, Munsif of Farrukhabad, dated the 30th of August, 1923

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Held, that the reference to arbitration and the award made thereon amounted to an acknowledgement of liability within the meaning of section 19 of the Indian Limitation Act, 1908, and the suit was not time-barred.

An acknowledgement, to take the case out of the statute of limitations, must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed

Manuram Seth v. *Seth Rupchand* (1), followed. *In re Rivers Steam Company, Mitchell's Claim* (2), referred to

THIS was a second appeal arising out of a suit based on a simple mortgage-deed executed by one Sadho Singh in 1902. The plaintiffs were the descendants of the original mortgagee, and according to them the property mortgaged was joint family property and the mortgage was executed by the manager of the family for legal necessity.

In 1910 there was a dispute in the family about the liability of the various members for this and other debts, and the question was referred to arbitration, apparently on the 1st of March, 1910, and the arbitrators gave an award on the 3rd of December, 1910, apportioning the liability Phul Singh and Jang Bahadur Singh, two of the members of the family, alone failed to pay the amounts for which the arbitrators had found them to be liable The plaintiffs, therefore, filed this suit on the 1st of March, 1922, against Phul Singh and Jang Bahadur Singh, but they also impleaded the other members of the family and the subsequent mortgagees, as a decree was desired for sale of the entire property mortgaged. Phul Singh alone contested the suit. The mortgage-deed of 1902 was found by both the courts below to

(1) (1906) I L R, 33 Calc, 1047 (2) (1871) L R, 6 Ch App, 822

be genuine and for consideration, and in the arbitration proceedings of 1910 it was found to have been executed for legal necessity. These points were not argued in appeal. The trial court gave the plaintiffs a decree for sale of one-third of the property mortgaged, on the ground that one-third of the joint family property was the share of Gurdat Singh, the father of the two defaulters. This decree was upheld in the court of first appeal. Phul Singh appealed.

Pandit *Uma Shankar Bajpai* and Munshi *Binod Bihari Lal*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondents

The judgement of the Court (BOYS and KENDALL, JJ.), after setting forth the facts as above, thus continued :—

The only ground of appeal that has been seriously argued before us is the one of limitation The mortgage-deed having been executed in 1902 and the suit having been filed in 1922, it would clearly be barred unless there were some special circumstance to save it It has been held by the courts below that the agreement to refer this dispute with others to arbitration in March, 1910, together with the award, amounted to an "acknowledgement" which would start a fresh period of limitation under section 19 of the Limitation Act. This finding is disputed. The deed of reference to arbitration is not in evidence, having been lost; but the courts below have admitted secondary evidence which proves that the appellant and the other members of his family had executed the agreement of reference and had asked the arbitrators to determine whether they were liable for the debt in suit and for other debts The original award of the arbitrators, which is registered, had also been lost; but a copy of this was admitted in evidence, and shows

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that the appellant as well as the others were liable, and it apportioned the amount among them

It has been argued, in the first place, that this was not an acknowledgement, because it was not made to the mortgagee or anyone representing him, but was merely a mutual arrangement among the representatives of the mortgagor. The final sentence of Explanation I to section 19 of the Limitation Act, however, is sufficient to dispose of this objection. It has further been argued that the words which have been proved to constitute the material part of the agreement do not in themselves amount to an acknowledgement It is urged that an acknowledgement, to save limitation, must be unconditional and that it must amount to an admission of an existing liability and not merely a contingent liability We have to consider the circumstances in which the agreement was made. There was a mortgage of what is now said to be joint family property, and the members of the joint family were disputing among themselves as to the liability. All of them were ready to undertake to discharge the liability, if it were found by the arbitrators to be existing. The case is not entirely similar to the one decided by their Lordships of the Privy Council in *Maniram Seth* v *Seth Rupchand* (1), but we think that the authority contained therein is sufficient to cover the facts.

"The question is whether a given state of circumstances falls within the natural meaning of a word, which is not a word of art, but an ordinary word of the English language . . In a case of very great weight, the authority of which has never been called in question, Lord Justice MELLISH laid it down that an acknowledgement to take the case out of the Statute of Limitations must be either

(1) (1906) I L R , 33 Calc , 1047

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one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed."—*In re Rivers Steam Company, Mitchell's Claim* (1).

We think that, in the present case, there was a conditional promise to pay the debt, and that there was in the award evidence that the condition had been performed. We think, therefore, that the lower courts were justified in concluding that there had been an acknowledgement by which the mortgage-deed of 1902 was kept alive

It has also been argued that the decision to give a decree for sale of one-third of the mortgaged property was wrong, inasmuch as the share of the two defaulters in the joint family property, as the genealogical table shows, must be 2/12 and not 1/3. There does not appear to us to be any force in this argument either. The whole of the mortgaged property was liable under the mortgage-deed, including the one-third which is said to have been the share of Gurdat Singh. The contesting defendants were found to be the descendants of Gurdat Singh and are presumably still in possession of that share The evidence is not sufficient to show whether the defaulter's shares have been separated, or what their separated shares would amount to The result is that the appeal is dismissed with costs.

Appeal dismissed.

(1) (1871) L R , 6 Ch App , 822 (828)

FULL BENCH.

Before Justice Sir Cecil Walsh, Mr Justice Lindsay, Mr. Justice Sulaiman, Mr Justice Mukerji, Mr Justice Banerji, Mr Justice Ashworth and Mr Justice Iqbal Ahmad

1927 March. 31

BANSIDHAR AND OTHERS (DEFENDANTS) *v* SAMPAT KUMAR SINGH AND OTHERS (PLAINTIFFS).*

Act No II of 1927 [Indian Registration (Amendment) Act], section 2—Registration—Written contract for sale containing acknowledgement of receipt of part consideration or earnest money

A contract for the sale of immovable property which contains an acknowledgement of the receipt of part consideration or earnest money does not require registration.

Dayal Singh v *Indar Singh* (1), referred to

THIS was a reference to the Chief Justice for the appointment of a Full Bench for the decision of the point of law set forth in the following order —

LINDSAY and SULAIMAN, JJ :—This appeal arises out of a suit for specific performance of a contract for sale The court below has decreed the claim. One of the points raised in appeal on behalf of the appellants is that the alleged contract of sale, dated the 1st of September, 1918, reciting the receipt of Rs. 500 out of the sale consideration, required registration. The point in this form was not taken in the court below, but since the appeal was filed the case of *Dayal Singh* v *Indar Singh* (1), has been decided by their Lordships of the Privy Council, on which strong reliance is placed on behalf of the appellants.

*First Appeal No 445 of 1923, from a decree of Jogendra Nath Chaudhri, Subordinate Judge of Gorakhpur, dated the 11th of September, 1923

(1) (1926) 24 A L J , 807

As the question, whether contracts for sale, if reduced to writing, which contain an acknowledgement of receipt of part consideration require registration, is a very important one and arises in numerous cases, we think that it is necessary that this point should be considered by a larger Bench, so that the decision may be authoritative We, therefore, refer the following question to a Full Bench :— Whether the contract for sale, as embodied in the document No. 387, dated the 1st of September, 1918, printed at page 155 of the paper-book, required to be registered.

The record will be placed before the Hon'ble the Acting Chief Justice for the constitution of a Full Bench

Sir *Tej Bahadur Sapru*, Dr. *Surendra Nath Sen*, Munshi *Haribans Sahai* and Pandit *S. S. Shastry*, for the appellants.

Mr *B E. O'Conor*, Dr *Kailas Nath Katju*, Mr. *Sankar Saran* and Munshi *Harnandan Prasad*, for the respondents.

LINDSAY, J :—The question to be decided by this Full Bench is set out in the referring order of the 2nd December, 1926, in the following terms :—

" Whether the contract for sale, as embodied in the document No 387, dated the 1st of September, 1918, printed at page 155 of the paper-book, required to be registered "

The paper-book mentioned is the printed record of First Appeal No. 445 of 1923, and the document at page 155 purports to be a contract for the sale of immovable property, consisting of a 14-anna share in mahal No. 1 of mauza Dudhai, for a sum of Rs. 36,000. In the body of the deed it is recited that

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Lindsay, J

the executants (the proposed vendors) being in need of Rs. 500 for the purchase of the stamp for the sale-deed and for other necessary expenses have taken this sum from the proposed purchasers, credit for which is to be allowed to the purchasers against the settled price of Rs. 36,000. In the concluding portion of the deed this sum of Rs. 500 is spoken of as being earnest money, but the payment was clearly a payment of a portion of the purchase money

The reference of the question mentioned above for the decision of this Bench was rendered necessary by the judgement of their Lordships of the Privy Council in *Dayal Singh* v *Indar Singh* (1)

On the 13th of December, 1926, when the case first came up before the present Bench, the hearing was adjourned in view of impending legislation and since then there has been passed the Indian Registration (Amendment) Act, 1927 (Act II of 1927) which has come into force from the 18th of February, 1927. By this Act there has been added to section 17, sub-section (2), of the Indian Registration Act, 1907. the following explanation :—

" *Explanation* —A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money "

The document of the 1st of September, 1918, with which we are now concerned, is a document of the description given in the above explanation, and it follows, therefore, that in virtue of this new enactment it did not require to be registered.

(1) (1926) 24 A L J , 807

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With this answer to the question submitted for decision, the record is returned to the Bench concerned

WALSH, SULAIMAN, MUKERJI, BANERJI, ASHWORTH and IQBAL AHMAD, JJ :—We agree.

Reference answered in the negative.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr Justice Dalal.

MITTHU LAL (DEFENDANT) *v* DEOJIT AND ANOTHER (PLAINTIFFS).*

1927 *March*, 31.

Mortgage—Suit for sale—Preliminary decree—Objection as to amount due on mortgage not competent after passing of the preliminary decree—New ground of appeal added after period of limitation—Such ground not entertainable

An objection that the amount due on a mortgage ought to be reduced should be put forward at the time the preliminary decree is passed At the time of the preparation of the final decree the amount fixed in the preliminary decree cannot be altered except for some reason or some event which may have happened subsequent to the preliminary decree *Imam Ali v Baij Nath Ram Sahu* (1), distinguished

A plea raised in a ground of appeal added at a date when it is time-barred, although the addition was made with the permission of the court and without any objection on the ground of limitation being raised by the other party, cannot be argued

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

*First Appeal No 157 of 1924, from a decree of Muhammad Ziaul Hasan, Subordinate Judge of Mainpuri, dated the 19th of January, 1924

(1) (1906) I L R. 33 Calc, 613

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MITTHU LAL v. DEOJIT

Pandit *Ambika Prasad Pande*, Munshi *Benod Behari Lal* and Munshi *Shiam Sundar Lal*, for the appellant

Munshi *Narain Prasad Ashthana*, for the respondents

MEARS, C J, and DALAL, J.:—A suit for sale was brought and a preliminary decree was passed by the trial court on the 6th of December, 1920 This is an appeal from the final decree. One of the mortgagors, Radhe Singh, died and his successors in interest were not brought on the record within the period of limitation It is represented that Radhe Singh was dead at the time of the passing of the preliminary decree on the 6th of December, 1920, and that, therefore, when the final decree was passed the amount of the decree ought to have been reduced proportionate to the share of Radhe Singh in the property Radhe Singh's share was one-ninth, so the appeal is valued at Rs. 775, one-ninth of the amount of Rs 6,973 entered in the final decree. In support of his contention the learned counsel quoted the ruling in the case of *Imam Ali* v. *Baij Nath Ram Sahu* (1) In that case, on account of the failure of the decree-holder to bring on the record the legal representatives of one of the judgement-debtors, the decree-holder was deprived of his remedy against part of the property ordered to be sold in execution of the decree The learned Judges held that the decree-holder could not burden the rest of the property with the amount payable by the property against which he had lost his claim through his own negligence. The case here, however, is different. It is stated on behalf of the appellant that Radhe Singh was dead at the time of the passing of the

(1) (1906) I L R, 33 Calc, 613

preliminary decree and nothing has happened subsequent to that decree which would entitle the appellant to ask for a reduction of the amount fixed in the preliminary decree This objection as to the reduction of the amount due on the mortgage should have been put forward at the time the preliminary decree was passed At the time of the preparation of the final decree the amount fixed in the preliminary decree cannot be altered except for some reason or some event which may have happened subsequent to the preliminary decree. We are, therefore, of opinion that grounds Nos. 1 and 2 of the appeal fail and the amount entered in the final decree cannot be reduced.

The third ground of appeal was added on the 8th of February, 1927 On that date it is admitted that the new plea raised in that ground of appeal was time-barred. It is argued, however, that this fresh ground was added with the permission of this Court after arguments on both sides were heard. On that day the plea of limitation was not raised and no decision was arrived at by this Court A plea of limitation can be raised at any moment prior to the decision of the appeal, and we think that the respondents' counsel, Mr *Narain Prasad,* is entitled to raise the plea though the fresh ground of appeal was added with the permission of this Court. As that ground of appeal was barred by limitation on the date on which it was added, we are of opinion that it cannot be argued today.

In the result we dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr Justice Mukerji and Mr Justice Ashworth

1927 March, 31

TEJ SINGH AND ANOTHER (DEFENDANTS) *v* GHASI RAM AND OTHERS (PLAINTIFFS) *

Civil Procedure Code, section 115; schedule II, paragraphs 15 and 16(2)—Arbitration—Reference made without consent of all the parties—Decree based on consequent award—Appeal—Revision

A reference to arbitration made by a court upon an application in which all the parties to the suit have not joined is a reference made without jurisdiction and is liable to be set aside in the exercise of the High Court's revisional jurisdiction

Held by ASHWORTH, J., that when in such a case a decree has been passed on the award no appeal will lie except in so far as it is in excess of or not in accordance with the award

Gopal Das v *Bay Nath* (1), *Tursi Ram* v. *Basdeo* (2) and *Sahdeo Singh* v. *Melhu Singh* (3), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear sufficiently from the judgement of ASHWORTH, J.

Munshi *Panna Lal*, for the appellants.

Mr *P. N. Sapru*, for the respondents.

ASHWORTH, J.:—This is an appeal by two persons against whom a decree has been given according to an arbitration award. One of the appellants was no party to the application for reference. After the award was made by the arbitrators he filed an objection to it on this ground. That objection was rejected by the trial Judge on the ground that he had been absent up to the time when the award was given.

* First Appeal converted into Civil Revision No. 93 of 1927

(1) (1925) I L R., 48 All., 239 (2) (1926) 24 A L J., 705
(3) (1926) I L R., 49 All., 178.

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Ashworth, J.

It is argued that paragraph 16(2) of the second schedule to the Code of Civil Procedure debars him from setting up as a ground of appeal the fact that he was no party to the reference. Paragraph 16 states that where a court sees no cause to remit an award and no application has been made to set aside the award or the court has refused such application the court shall, after the time for making such application, proceed to pronounce judgement according to the award. Sub-clause (2) of that paragraph provides that upon the judgement so pronounced a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award I am prepared to hold in this case that the court had no jurisdiction to refer the subject-matter of the suit to arbitration without the consent of all the parties and I am further prepared to hold that paragraph 15 of the schedule does not apply to an award which has been made upon a reference, to make which the court had no jurisdiction. I construe the second clause of paragraph 16 to mean that once there is an award, a decree based thereon cannot be questioned in appeal except in so far as it is in excess of or is not in accordance with the award. It is another question, however, whether such a decree is liable to revision under section 115 of the Code of Civil Procedure Where no appeal lies except on grounds which are not available in any particular case, it appears to me that it may be said that in that case no appeal lies Consequently revision under section 115 is permissible where the jurisdiction of the court passing the decree is called in question, as is the case here. There is abundant authority for holding that a court referring a matter to arbitration at the request of some

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only of the parties is acting beyond the jurisdiction allowed by the second schedule of the Code of Civil Procedure Consequently, although I hold that no appeal lies, I hold that we are entitled to deal with the first objection taken in this memorandum of appeal by way of revision It is an established practice that this Court can treat a memorandum of appeal as an application for revision when no appeal lies. Taking this view, I would set aside the decree of the lower court as a decree passed without jurisdiction and direct the court to set aside the award and proceed to try the suit in accordance with law I would make the costs abide the result

MUKERJI, J.—I agree that the suit must be remanded for disposal on the merits. In view of the fact that I agree with my learned brother that we have jurisdiction to take up the matter in revision, I prefer not to decide whether an appeal would lie See *Gopal Das* v. *Baij Nath* (1) My opinion on the question of appeal will be found reported in *Tursi Ram* v. *Basdeo* (2) and *Sahdeo Singh* v. *Mulhu Singh* (3). Those cases, however, do not cover the circumstances of the present case. It is a matter for serious consideration whether an award to be binding and to be one from which no appeal would lie, should not be based on a genuine reference I do not quite see how a party, who never agreed to refer his dispute to arbitration, can be estopped from appealing on the ground that he was no party to the reference. As already stated, I do not propose to offer any decided opinion on that point in the present case

There can be no doubt that Sheo Ram Singh was an interested party in the subject-matter of the

(1) (1925) I L R, 48 All, 970. (2) (1926) 24 A L J., 705.
(3) (1926) I L R, 49 All, 173

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suit for partition. He was admittedly a member of a joint Hindu family and had a share. In the circumstances his mere absence cannot make him a party not interested in the subject-matter of reference The reference, therefore, without his concurrence was invalid and the award cannot be sustained. The matter must be taken up in revision, if not in appeal.

BY THE COURT.—We dismiss the appeal but, taking up the matter in revision, set aside the decree of the court below and remand the suit to it with the direction that the award should be put aside and the suit should be proceeded with in accordance with law. Costs here and hitherto will abide the result.

APPELLATE CIVIL.

Before Mr Justice Boys and Mr Justice Kendall

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April, 8

SITA SARAN (DEFENDANT) *v* JAGAT AND OTHERS (PLAINTIFFS) AND ANANTA AND OTHERS (DEFENDANTS).*

Hindu law—Hindu widow—Alienations by widow—Right of suit by remote reversioners during lifetime of nearer reversioners.

If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is

* Second Appeal No 30 of 1925, from a decree of D C Hunter, District Judge of Allahabad, dated the 9th of June, 1924, confirming a decree of Gauri Shankar Tewari, Subordinate Judge of Mirzapur, dated the 14th of May, 1923

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entitled to sue, and would probably require the nearer reversioner to be made a party to the suit *Ram Anand Kunwar* v. *The Court of Wards* (1), followed

But where the plaintiffs sue as next reversioners, it is improper to read into the plaint an allegation that they are bringing the suit as distant reversioners because the nearer reversioners have either precluded themselves from bringing the suit or have refused to do so *Meghu Rai* v. *Ram Khelawan* (2) and *Jhandu* v *Tarif* (3), referred to

THE facts of this case were as follows :—

This was a second appeal arising out of a suit brought by certain reversioners to the estate of one Sheo Sampat deceased for a declaration that a deed of gift executed by Musammat Khatrani, the widow of Sheo Sampat, in favour of her grandson, Godari (now deceased), and some mortgage-deeds based upon it, were void and ineffectual against the plaintiff.

It was found by the courts below that the property concerned was not joint family property but was the personal property of Sheo Sampat, who was separate from the plaintiffs It was also found that the plaintiffs, who were the first cousins of Sheo Sampat, were not the nearest reversioners to him, because there intervened, at the time when the suit was filed, Musammat Umraoti, a daughter of Sheo Sampat, and her minor son Barhamdeo Pande. The decree given by the lower appellate court, which upheld the decision of the trial court, in favour of the plaintiffs, was challenged in second appeal only on the ground that the plaintiffs, as remoter reversioners, had no right to sue.

Munshi *Surendra Nath Varma*, for the appellant.

Dr *Kailas Nath Katju*, for the respondents.

(1) (1880) I L R, 6 Calc, 761 (2) (1913) I L R, 35 All, 326
(3) (1914) I L R., 37 All, 46

THE judgement of the Court (BOYS and KENDALL, JJ.), after stating the facts as above, thus continued :—

The circumstances in which a remoter reversioner may sue for a declaration in the presence of a nearer reversioner have been described in the well-known decision of their Lordships of the Privy Council in the case of *Rani Anand Kunwar* v. *The Court of Wards* (1). After remarking that, as a general rule, a suit of this nature must be brought by the presumptive reversionary heirs, their Lordships go on to say :—

"They are also of opinion that such a suit may be brought by a more distant reversioner, if those nearer in succession are in collusion with the widow or have pre-succession are in collusion with the widow or have precluded themselves from interfering . The right to sue must, in their Lordships' opinion, be limited If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to sue . In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit."

The trial court dealt with the question of the plaintiffs' right to sue, very summarily; and the lower appellate court, while holding that it had not been proved that the nearer reversioner had colluded with the widow or become precluded from suing, refused to interfere with the decree of the trial court on the ground that, if the suit were dismissed, the plaintiffs could then institute an exactly similar suit in the

(1) (1880) I L R, 6 Calc, 764

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name of the minor Barhamdeo as his next friends and would then be entitled to succeed. It has been urged in appeal that this was not a proper ground for allowing the plaintiffs' suit

We may say, in the first place, that no very determined effort has been made to show that the nearer reversioners had colluded with the widow (Musammat Khatrani) or had become precluded from suing in any of the ways enumerated in the decision of the Privy Council referred to above. The plaintiffs had claimed, in the first place, that Sheo Sampat had been a member of a joint Hindu family with them and that they were entitled to possession of the property. They had also claimed that, if the court should find that Sheo Sampat had been separate at the time of his death, they were entitled to the declaration on the ground that they were reversionary heirs according to the pedigree which they then appended. It seems to us to be a matter of importance that, when they filed the plaint, they omitted all mention of Musammat Umraoti and of her minor son Barhamdeo Pande In other words, the pedigree with the original plaint disclosed the plaintiffs as the nearest reversioners to Sheo Sampat, and it was only after the written statement had been filed by the husband of Musammat Sumetra, who had executed one of the mortgage-deeds impugned in the plaint, and by some other transferees, that the court ordered the nearer reversioners to be impleaded and the pedigree to be amended. Musammat Umraoti filed a written statement in which she admitted that the plaintiffs and Sheo Sampat were members of one joint Hindu family; that is to say, so far from colluding with Musammat Khatrani she supported that part of the plaintiffs' suit; and as regards the alternative plea that the plaintiffs were reversioners

and could avoid the transfer based on the deed of gift executed by the widow, she professed indifference. The plaintiffs are precluded, however, not only by Musammat Umraoti, whose interest in the estate would be a limited one, but by her minor son, Barhamdeo Pande. There is nothing to show that his interests have been effectively represented at all. The argument that has been pressed on behalf of the plaintiffs respondents is that a decree in favour of the plaintiffs must also be for the benefit of the minor, because the minor is interested to the same extent as the plaintiffs in setting aside the transfers made on the basis of the widow's deed of gift.

This argument is a plausible one, and it may be that if the appeal is allowed the plaintiffs will then be in a position to file an exactly similar suit as next friend of the minor, Barhamdeo Pande We are, however, by no means convinced that the interests of the plaintiffs and of the minor are identical There is no sufficient explanation of the fact that the plaintiffs omitted all mention of Musammat Umraoti and Barhamdeo Pande in their original plaint and that they impliedly, at any rate, claimed themselves to be the nearest reversioners to Sheo Sampat. It is quite inconceivable that they did so either from ignorance or inadvertence It is, moreover, mentioned in the written statement of Musammat Umraoti that the plaintiffs succeeded in obtaining a deed of relinquishment in their favour from Musammat Khatrani. If the plaintiffs really held such a deed of relinquishment, it is difficult to tell how far it would affect the interests of Barhamdeo Pande. Presumably it would only have the effect of transferring the limited interests of the widow; but, in the absence of evidence, it is of course impossible to decide what its effect would be We have the authority of a Bench of this Court

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for holding that, where the plaintiffs sue as next reversioners, it is improper to read into the plaint an allegation that they are bringing the suit as distant reversioners because the nearer reversioners have either precluded themselves from bringing the suit or have refused to do so. See *Meghu Rai* v *Ram Khelawan* (1). In a decision of the Privy Council, *Jhandu* v. *Tarif* (2), the plaintiff failed, in somewhat similar circumstances, because he had not proved that a nearer reversioner was excluded. For the purposes of the present suit it is enough to say that the authority of the leading case quoted above does not support the plaintiffs' title to sue, and that the circumstances disclosed to us do not justify us in going beyond that authority

The result is that we allow the appeal and order that the plaintiffs' suit be dismissed with costs throughout.

Appeal allowed

Before Mr Justice Mukerji and Mr. Justice Ashworth.

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April, 8

BHAWANI AND OTHERS (PLAINTIFFS) *v.* MANGALI SINGH (DEFENDANT)*

Act (Local) No II of 1901 *(Agra Tenancy Act), sections* 20, 21, 24 *and* 25—*Occupancy holding—Transfer—Sub-lease.*

Plaintiffs, who were occupancy tenants, were in debt to their landlord both in respect of arrears of rent of their holding and otherwise. They, therefore, executed a document granting to the defendant a right to hold their occupancy holding for five years in consideration of his undertaking to pay the arrears of rent and also the future rent as it became due The defendant did not pay according to his

* Second Appeal No 67 of 1925, from a decree of Hanuman Prasad Verma, Second Subordinate Judge of Moradabad, dated the 27th of September, 1924, confirming a decree of Padma Datt Pande, Munsif of Chandausi, dated the 22nd of January, 1924.

(1) (1913) I L R, 35 All, 326. (2) (1914) I L R, 37 All., 45

agreement, and the landlord thereupon ejected the plaintiffs

Held, on suit by the plaintiffs to recover damages from the defendant for non-fulfilment of his agreement, that the agreement in question was not a sub-lease, but a transfer, and as such was forbidden by the provisions of the Agra Tenancy Act, 1901, and the plaintiffs could not sue on it *Nidha Sah* v *Murli Dhar* (1), referred to

THE facts of this case were as follows :—

The plaintiffs, on the 6th of July, 1921, were in debt to their landholder in respect of the rent due for a certain occupancy holding They also owed certain other debts In order to meet these liabilities they executed a document granting to the defendant a right to hold their occupancy holding for a period of five years in consideration of the defendant promising to meet the arrears of rent and the outstanding debts, calculated at a sum of Rs. 600, and also in consideration of the defendant paying the annual rent due to the landholder of the plaintiffs The defendant failed to pay the arrears of rent and in consequence of this the landholder sued the plaintiffs for arrears of rent. The plaintiffs were unable to satisfy the decree for arrears in full and consequently they were ejected by their landholder in execution of the decree for arrears The plaintiffs thereupon sued the defendant for Rs 1,000 damages, the estimated value of the occupancy holding

The first court dismissed the suit on the ground that there was some collusion or negligence on the part of the plaintiffs which would not justify their being awarded any damages The lower appellate court upheld the dismissal of the suit on two grounds It held that there was contributory negligence on the part of the plaintiffs, because they could have satisfied the decree for arrears of rent and in that case would

(1) (1902) I L R., 25 All., 115

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not have lost the holding. It also held that the contract on which the plaintiffs sued was one forbidden by the Tenancy Act and void. The plaintiffs appealed.

Dr. *N. C. Vaish*, for the appellants.

Mr. *Nihal Chand*, for the respondent.

The judgement of ASHWORTH, J., after reciting the facts as above, thus continued :—

As to the lower appellate court's first reason for dismissal of the suit, namely, contributory negligence, we find it difficult to accept it, but in view of our decision on the other question that arises in appeal it is unnecessary to affirm or disaffirm this finding.

The real question in this appeal is whether the grant, transfer or agreement, whichever we may call it, on which the suit is based, is void under sections 20 and 21 of the Tenancy Act (Act II of 1901) Those sections read with sections 24 and 25 of the Act in effect provide that the interest of an occupancy tenancy is not transferable otherwise than under a sub lease for a term not exceeding five years The document in suit provided for the transferees having a right of occupation for five years of the holding. On the expiry of that date there should be no accounting, but the plaintiffs were entitled to resume the holding. In view of the Privy Council decision, *Nidha Sah* v *Murli Dhar* (1), we find it difficult to hold that the transaction amounted to a mortgage. The transaction appears to have been a grant of land for a fixed term free of rent in consideration of a promise to pay certain debts already due and to pay the rent as it became due yearly to the zamindars. We have been shown several decisions which seem to depend on the question whether a transaction was a mortgage or a lease.

(1) (1902) I L R, 25 All., 116

The question in this case, however, is whether the transaction was a sub-lease within the terms of sections 24 and 25 of the Tenancy Act. It is clear that these sections contemplate the creation of a sub-tenant. A tenant is defined as the person by whom rent is payable. Rent is defined as whatever is in cash or kind to be paid or delivered by a tenant for land held by him. In view of these definitions and also the provisions generally of the Tenancy Act, it seems to us that the sub-lease contemplated by sections 24 and 25 of the Tenancy Act must mean a contract under which the person given the right of occupation is bound, *after entering into occupation, to pay something in cash or kind* to the person granting that right, and will not apply where, as in this case, nothing at all is to be paid in cash or kind to the person transferring the right of occupation

The transaction in question was clearly a transfer, and for the reasons stated we hold that it was not a sub-lease within the meaning of sections 24 and 25 It follows that it was void and the lower appellate court was, in our opinion, right in holding that the plaintiffs could not sue on it. For these reasons we dismiss the appeal with costs

MUKERJI, J. —I agree with my learned brother that the transaction before us is not one of pure sub-lease, which alone is permitted by sections 24 and 25 of the Tenancy Act

The facts of the case are given in my brother's judgement. The defendant advanced a sum of Rs. 600 and it was agreed that he was to recoup himself with what he got out of the tenancy, after payment of the zamindar's rent, in the course of five years of occupancy On the one hand it is said that the defendant was to pay himself Rs. 120 a year, the

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Mukerji, J

rent which was payable to the principal tenant. On the other hand it is said that the sum of Rs. 600 advanced was recoverable with interest though none was in terms stipulated for. On one side it is argued that it is a case of sub-lease, pure and simple. On the other hand, it is said that it is a case of a pure usufructuary mortgage limited for a time.

There can be no doubt that the transaction falls entirely within the four corners of section 58 of the Transfer of Property Act and the transaction is one of a pure usufructuary mortgage It cannot be doubted that in a purely usufructuary mortgage the only security that the mortgagee gets is his possession over the property. He is not entitled to sell the property and if he is dispossessed he can only claim back possession. If that sort of security be good enough to make a mortgage, a transaction in which "security" is essential, the present transaction is equally a transaction in which security was furnished in the shape of a tenancy holding It was argued that the dictum of their Lordships of the Privy Council in *Nidha Sah* v. *Murli Dhar* (1) established that a transaction like the present one was not one of mortgage. Their Lordships, however, did not decide anything like that. Their Lordships only indicated what were certain considerations against the transaction before them being held to be a mortgage. The question never specifically arose and was never specifically decided. Their Lordships, for the purpose of the decision of the case, called the promisee in the case a mortgagee and decided the suit on the terms into which the parties had entered In the present case, it is impossible to believe that the defendant was foregoing his interest on the sum of Rs 600 he had lent and was simply repaying himself, in small portions,

(1) (1902) I L R , 25 All , 115

viz., Rs. 120 a year, only the principal amount As a matter of fact the yield of the occupancy tenancy must have been enough to cover a proper interest on the sum of Rs 600 for the first year and proportionately smaller amounts in later years Whatever, however, may be the precise nature of the transaction, I am satisfied, as is my learned brother, that it is not a case of sub-letting within the meaning of sections 24 and 25 of the Tenancy Act.

BY THE COURT —The appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Banerji.

EMPEROR *v* PARBHU DAYAL *

1927
April, 6.

Criminal Procedure Code, section 499—Surety—Illegal direction to produce accused at a place other than that mentioned in the bail bond—Accused in consequence absconding—Forfeiture of bail bond

According to the terms of a bail bond the surety was responsible for the production of the accused in the City Magistrate's court at Agra But as several cases were pending against the accused, the District Magistrate directed the surety to produce the accused in a court at Purnea. The surety endeavoured to carry out this order but the accused absconded on the way to Purnea. Subsequently the surety was ordered to produce the accused at Agra and, as he was unable to do so, his security money was forfeited *Held*, that the order forfeiting the bond was correct, but having regard to all the circumstances of the case, the ends of justice would be served by reducing the sum forfeited from Rs 1,000 to Rs 250

* Criminal Revision No 49 of 1927, from an order of H R Nevill, District Magistrate of Agra, dated the 17th of December, 1926

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Shamsuddin Sirkar v *Emperor* (1) and *Behari Lal Chatterjee* v *Emperor* (2), referred to

It is the duty of a surety to see that an accused does not run away, but where a surety has failed to produce the accused by reason of an illegal order passed by a Magistrate which the surety was not bound to carry out, and where there is no connivance and negligence, it cannot be said that the surety has acted irresponsibly

THE facts of this case are fully stated in the judgement of the Court.

Pandit *Uma Shankar Bajpai*, for the applicant.

The Assistant Government Advocate (Dr *M. Wali-ullah*), for the Crown.

BANERJI, J.:—Upon a report made by a post office Inspector the police at Agra arrested one Ram Prasad for sending bogus V P parcels On the 5th of September a remand was obtained and it appears that on the 15th of September Ram Prasad was released upon a bail bond which is as follows:—

"I, Parbhu Dayal, son of Puran Chand, caste Hindu, Excise Sub-Inspector, Bareilly City, hereby declare myself surety for Ram Prasad that he shall attend at the court of the City Magistrate of Agra on every day of the preliminary inquiry into the offence charged against him, and, should the case be sent for trial by the Court of Sessions, that he shall be, and appear, before the said court to answer the charge against him, and in case of his making default therein, I bind myself to forfeit to His Majesty the King-Emperor of India, the sum of Rs 1,000"

On the 3rd of October, 1925, the accused appeared before the City Magistrate who, considering the amount of security as insufficient and unsatisfactory, ordered further security to be given The Magistrate recorded the following order:—

"The surety appeared today He should give a further security of Rs 500"

(1) (1902) I.L R., 30 Calc., 107 (2) (1909) I L R., 36 Calc., 749.

And upon a further security bond having been executed for a sum of Rs. 500 the court ordered the release of Ram Prasad from custody.

A case seems to have been pending before the City Magistrate of Agra at that time and nothing apparently seems to have been done at Agra. But a case under section 420 of the Indian Penal Code was pending in the court of the Sub-Divisional Officer of Purnea. It also appears that there were other cases pending under section 420 in Bihar against the same accused. About the middle of December, 1925, the District Magistrate of Agra ordered Parbhu Dayal the petitioner to produce his son in the court of the Sub-Divisional Officer of Purnea. A perusal of the bail bond will show that the order of the District Magistrate of Agra was wholly illegal, in that Parbhu Dayal had never undertaken to produce his son at Purnea. The result of this order was that Ram Prasad disappeared while on his way to Purnea and he has not yet been arrested. Under section 499, clause (2), of the Code of Criminal Procedure, if the Magistrate who granted bail wanted the production of the accused in the court at Purnea, he could have entered that condition in the bail bond. Nothing seems to have been done with regard to the failure of Parbhu Dayal to produce Ram Prasad until we find that a letter was sent by the District Magistrate of Agra to the Deputy Commissioner of Delhi, dated the 6th of August, 1926, by which Parbhu Dayal was instructed to present his son Ram Prasad in the court of the City Magistrate of Agra in connection with a case under section 420 at Purnea. Be it noted that on that date the Magistrate of Agra knew perfectly well that it was a physical impossibility for

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Parbhu Dayal to produce his son because the Magistrate knew quite well, nine months before that, that the son had absconded when trying to comply with the order of the District Magistrate which, to my mind, was wholly illegal. Proceedings were taken under section 514 of the Code of Criminal Procedure by Mr Griffin, the City Magistrate of Agra. The learned Magistrate has accepted the statement on oath of Parbhu Dayal He says in his order :—

"I see no reason to believe that Parbhu Dayal connived at Ram Prasad's escape, but the escape was certainly due to his carelessness in leaving him alone on the way to Purnea He is, therefore, to blame on this ground Very generous provision is made for bail in the Code of Criminal Procedure. It is essential that this generosity should not be abused A surety must be a person who will take infinite care not to let his man get away If he is unable to look after his man then he must not stand surety for him, even though he be his son"

I entirely agree with the learned Magistrate that it is the duty of the surety to see that the accused does not run away, but I do not agree with the view that where a surety has failed to produce the accused by reason of an illegal order passed by a Magistrate which the surety was not bound to carry out, and where there is no connivance and no negligence, it can be said that the petitioner had stood surety irresponsibly, and I do not think that this would be a case which would give an impression that anyone can stand as a surety and not be penalized in the event of failing in his trust.

The petitioner went up before the learned District Magistrate of Agra and his petition was dismissed by him. In his order the learned District Magistrate has said as follows :—

"Technically he was liable to have his surety forfeited. The question is whether forfeiture to the extent ordered is

equitable It is urged on behalf of the appellant that morally the bond for the production of the accused in Agra was discharged when the surety was directed to take him elsewhere. Of course it was not formally or specifically discharged, but there was certainly a fresh direction and this direction, being unsupported by any formal order or bond, involved some amount of risk

The matter, therefore, resolves itself into the extent of carelessness or worse on the part of the appellant in letting the accused get beyond his control, that is to say, as stated by the City Magistrate, the extent of the punishment for negligence, since no imputation of connivance is put forward I certainly agree with the City Magistrate as to the serious nature of any such undertaking "

Having regard to the fact that it was the illegal direction of the Magistrate to Parbhu Dayal to produce the accused at Purnea that resulted in his failure to produce Ram Prasad, and having regard to the fact that when the order for the production of Ram Prasad was passed months after it was known that Ram Prasad had absconded by reason of an honest attempt of Parbhu Dayal to carry out the order of the Magistrate of Agra, I am of opinion that the forfeiture of the bond was a technical forfeiture and that the conduct of Parbhu Dayal shows that he was in no way to blame I am, however, unable to accept the contention of Mr *Bajpai* that there has been no non-compliance with the conditions of the bail bond and that the order of the District Magistrate of Agra directing the production of Ram Prasad at Purnea had discharged the bail bond. He has referred me to the cases of *Shamsuddin Sirkar* v *Emperor* (1), and *Behari Lal Chatterjee* v *Emperor* (2) In my opinion the facts in those cases were quite different from the facts of this case. It has been further argued that the notice of the District Magistrate of Agra, dated the 6th of August, 1926, mentions the words " In

(1) (1902) I L R , 30 Calc , 107 (2) (1909) I L R , 36 Calc , 749

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connexion with a case at Purnea," and this entry, as it does not refer to any case pending at Agra, makes the order illegal That there was a case pending at Agra there can be no doubt, although no active steps were taken in that case by reason of a number of cases being pending against Ram Prasad The mere entry of the words " in connexion with the case at Purnea " does not in any way vitiate the bail bond. Parbhu Dayal was asked to produce his son at Agra before the City Magistrate. He was bound to do so under the terms of this bond. I have, therefore, come to the conclusion that the order forfeiting the bond is correct, but in view of all the circumstances of this case, I am of opinion that the ends of justice will be served by directing that the order forfeiting the sum of Rs 1,000 be reduced to a sum of Rs. 250

APPELLATE CIVIL.

Before Mr Justice Boys and Mr. Justice Kendall

1927 April, 13

CHANDI PRASAD (DEFENDANT) *v* JAMNA (PLAINTIFF)*

Civil Procedure Code, order XXI, rules 22 and 66—Execution of decree—Death of judgement-debtor before issue of sale proclamation—Proclamation issued without bringing on record the judgement-debtor's legal representatives

Order XXI, rule 66, of the Code of Civil Procedure, expressly requires that the proclamation shall be drawn up after notice to the decree-holder and the judgement-debtor It is imperative on the court to issue a notice to the judgement-debtor

* Second Appeal No 220 of 1925, from a decree of Raj Rajeshwar Sahai, Third Additional Subordinate Judge of Aligarh, dated the 14th of October, 1924, confirming a decree of Aqib Nomani, Munsif of Koil, dated the 22nd of March, 1923

Where, therefore, the judgement-debtor has died before issue of such notice to him, and no representative is brought upon the record, proceedings in execution cannot be validly continued

Raghunath Das v *Sundar Das Khetri* (1), followed. *Sheo Prasad* v. *Hira Lal* (2), *Bhagwan Das* v *Jugul Kishore* (3), *Doraswami* v. *Chidambaram Pillai* (4) and *Rajagopala Ayyar* v *Ramanujacharlar* (5), referred to

THE facts of this case were as follows —

One Parbhu Lal was the original owner of the house which was the subject-matter of the suit. His wife was Musammat Sibo, and they had a daughter, Musammat Jamna. On the 12th of August, 1914, Parbhu Lal mortgaged this house to Chandi Prasad

One Ram Dayal obtained a simple money decree against Parbhu Lal, and in pursuance of that decree attached the house.

On the 23rd of September, 1916, Parbhu Lal died, apparently after the order for sale had been made but prior to the drawing up of the proclamation under order XXI, rule 66, and, therefore, no notice under that rule could have been issued to him

On the 29th of September, 1916, the sale proclamation was prepared, or, as described in the judgement of the lower appellate court, issued without the legal representative of Parbhu Lal, who at that time was Musammat Sibo, having been brought on the record, and was duly followed by a sale.

On the 13th of December, 1916, the sale took place, and Manni Lal purchased the house; but he never at any time obtained possession

In 1918 Chandi Prasad brought the suit No 185 of 1918 on his mortgage and impleaded both Musammat Sibo and Manni Lal On the 19th of August,

(1) (1914) I L R , 42 Calc , 72
(2) (1882) I L R , 12 All , 440
(3) (1920) I L R , 42 All , 570
(4) (1923) I L R , 47 Mad , 68
(5) (1923) I L R . 47 Mad , 289

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1918, he obtained a preliminary decree. On the 22nd of January, 1919, he applied for a final decree to be drawn up On the 26th of January, 1919, Musammat Sibo died She had possession of the house at her death and on her death Musammat Jamna succeeded as heir to her after Parbhu Lal, and continued to occupy the house. Musammat Jamna, however, was not at this stage impleaded as the legal representative of the mortgagor. On the 25th of February, 1919, the final decree was prepared. Several applications for execution were made against Manni Lal and Musammat Sibo, though the latter was dead

On the 27th of May, 1919, Musammat Jamna was impleaded as a party. She made several objections, one of which was that she had not been a party to the preparation of the final decree. On the 6th of February, 1920, the decree-holder decided to exempt her, Chandi Prasad's vakil stating that "Musammat Sibo was not a necessary party, her rights have been sold and the purchasers were parties, therefore the objector's (Musammat Jamna's) name be struck off" In the beginning of 1921, Manni Lal decided to try to obtain possession of the house, and brought a suit against Musammat Jamna, which was dismissed on the 16th of May, 1921, on the ground that Musammat Sibo, who was the legal representative of Parbhu Lal after his death, had not upon the death of Parbhu Lal been made a party to the execution proceedings under Ram Dayal's decree. To this suit of Manni Lal, Chandi Prasad was not a party Manni Lal did not appeal against the decree

On the 22nd of July, 1919, sale took place in execution of Chandi Prasad's decree, and Chandi Prasad himself purchased the house. On the 8th of

November, 1922, Chandi Prasad applied to get possession and hence the present suit by Musammat Jamna to have it declared that the decree in suit No 185 of 1918 was not binding on her, that the sale of the house in execution of the decree was also not binding on her, and that she was the owner of the house. The suit was decreed by the first court and this decree was upheld on appeal The defendant appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellant

Munshi *Sarkar Bahadur Johri*, for the respondent.

The judgement of the Court (BOYS and KENDALL, JJ), after setting out the facts as above, thus continued —

The case for the plaintiff, Musammat Jamna, is, as it was in the suit brought against her by Manni Lal, that the purchase by Manni Lal in execution of the decree of Ram Dayal was a nullity, because, after the death of Parbhu Lal his legal representative, Musammat Sibo, had not been brought on the record; that, though she herself (Musammat Jamna) at one stage in the execution proceedings in the decree of Chandi Prasad had, after the death of Musammat Sibo, been made a party as the then legal representative of the mortgagor, Parbhu Lal, yet she had been exempted and, therefore, treated as if she had never been made a party, and the decree of Chandi Prasad was inoperative against her; and finally that the decree of Chandi Prasad against Manni Lal was inoperative, as the sale to him in execution of the decree of Ram Dayal was a nullity, and consequently he was not a legal representative of Parbhu Lal, the mortgagor For the defence and for the appellant here it is frankly admitted that, if the execution proceedings subsequent to Parbhu's death, including the sale

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in favour of Manni Lal, were null and void then Manni Lal was not the legal representative of Parbhu Lal, the mortgagor, and that, as Musammat Jamana must be treated as if she had never been made a party to the execution proceedings in the decree of Chandi Prasad, her suit must succeed as it has succeeded in both the courts below.

The defendant appellant, therefore, has to establish that execution proceedings subsequent to Parbhu's death were not null and void. There is no question here of a mere irregularity in the sale, requiring to be supported by proof of substantial injury, before the sale could be set aside under order XXI, rule 90. The question is whether valid execution proceedings could continue in the absence of a living judgement-debtor or his legal representative.

Before considering the judicial authorities that have been quoted to us we will refer to the relevant sections and rules of the Code of Civil Procedure. The first of these is section 50. That section, in our view, does not call in any way for the issue of a notice beyond that it suggests that the law contemplates there being on the record either a living judgement-debtor or his legal representative. With the exception of this inference to be drawn from it all that it does is to inform a decree-holder that if the judgement-debtor has died before the decree has been fully satisfied he can, if he wishes to execute the decree, proceed against the judgement-debtor's legal representative. How he is to proceed is laid down in order XXI, rule 22. That provides that if an application for execution is made against the legal representative, the latter shall have notice to show cause. In reference to this it has been suggested

that it only applies where an application for execution is being made, and does not apply to the proceedings consequent on that application, and that, therefore, it would have no applicability to a case where the judgement-debtor was alive at the time of the application for execution and died subsequently to the commencement of the execution. We are, however, not called upon to decide this particular point, for in the present case the first step that had to be taken after the death of the judgement-debtor in this case was the drawing up of the proclamation. Order XXI, rule 66, expressly requires that the proclamation shall be drawn up after notice to the decree-holder and the judgement-debtor It was, therefore, imperative on the court to issue a notice to the judgement-debtor. If the sale in the absence of a notice under rule 66 was not a nullity, then under order XXI, rule 90, it would be necessary for the legal representative of a judgement-debtor to show that he had sustained substantial injury by reason of the irregularity In our view the matter is concluded by the decision of their Lordships of the Privy Council in *Raghunath Das* v *Sundar Das Khetri* (1) That was a case which arose under the old Code of 1882, but the view of their Lordships was expressed in unequivocal terms that the failure to serve a proper notice on the legal representative rendered the sale "altogether irregular and inoperative." It was, moreover, a case not of failure to serve a notice of the application for execution, but the passing of the rights of the judgement-debtor to the Official Assignee in the middle of the execution proceedings In that case execution proceedings had reached the stage of an order for sale having been passed Before the sale had actually

(1) (1914) I L R, 42 Calc. 72

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taken place an insolvency order was passed against the judgement-debtor whereby the property vested in the Official Assignee. The decree-holder took a step by way of serving a notice on the Official Assignee but the notice was merely to show cause why he, the Official Assignee, should not be substituted for the judgement-debtor and did not give him specific notice to resist the execution proceedings if he desired to do so. The Official Assignee ignored the notice and subsequently the decree-holder obtained an order from the court bringing the Official Assignee on to the record and an order for the sale to proceed. It proceeded and the decree-holder himself purchased. Subsequently the Official Assignee by due process of law himself sold the property. As against the second purchaser their Lordships held that the first sale, by reason of the failure to serve a proper notice on the Official Assignee to resist the execution proceedings, if he so wished, was a complete nullity. At page 80 of the report their Lordships said—

> "At any rate the execution could not proceed until the Official Assignee had been properly brought before the court, and an order binding on him had been obtained."

And again at page 82 they say :—

> "Their Lordships are of opinion that this sale was altogether irregular and inoperative"

and they gave three reasons for that view, all of which were apparently regarded as equally conclusive In reference to the matter before us now they say :

> "In the second place no proper steps had been taken to bring the Official Assignee before the court and obtain an order binding on him and, accordingly, he was not bound by anything which was done"

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In our view this concludes the present question.

It is, however, desirable to say a few words in reference to the argument which was addressed to us founded on the Full Bench decision of this Court in *Sheo Prasad* v. *Hira Lal* (1). In our view the whole of that argument was really beside the point. In that case the judgement-debtor had died after the proclamation of the sale and his legal representative was not brought on the record or served with a notice before the sale took place. Four of the learned Judges held that if the judgement-debtor had died before the attachment took place, the decree-holder was bound to proceed to bring the legal representative on the record; but where, as in that case, the property had been attached before the death of the judgement-debtor, the property was in the custody of the court and the sale could properly proceed without the legal representative being brought on the record Whether, if this decision was still binding on us, we should be prepared to accept it without asking for the matter to be referred again to a Full Bench for fresh consideration, we need not determine, for there is another element in that case which indicates that it is clearly no longer binding on us. The four Judges (MAHMOOD, J., dissented) were clearly influenced in the decision at which they arrived by the consideration that they were unable to find throughout the Code any express provision requiring a fresh notice to be served on the judgement-debtor It is true that at that time there was no express provision requiring notice to be served on the judgement-debtor either preparatory to drafting the proclamation, or, after the proclamation had been drafted, prior to the sale In the present case, however, the facts are to this extent different that

(1) (1889) I L R., 12 All., 446

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the judgement-debtor died not after the proclamation of sale had been drafted but before the proclamation, and a provision has been introduced into the Code of 1908 in order XXI, rule 66, corresponding to section 287 of the old Code, requiring the service of notice on the judgement-debtor. How far the insertion of this provision would override the decision of the Full Bench in a case where the judgement-debtor died after the sale proclamation, it is not necessary for us to determine. We were referred to a decision in *Bhagwan Das* v. *Jugul Kishore* (1), as being a case in which it was held that the decision of the Full Bench in *Sheo Prasad* v *Hira Lal* (2) was still law under the present Code. But that has no bearing on the present case at all. All that occurred in the later Allahabad case was that the Division Bench, which decided that case, relied on the decision in the Full Bench that an attachment did not necessarily abate owing to the death of the judgement-debtor, and execution proceedings would not have to be commenced *de novo*. The only other decision with which we were pressed was that in *Doraswami* v. *Chidambaram Pillai* (3), which was, however, overruled in the Full Bench decision of the same court in *Rajagopala Ayyar* v *Ramanujachariar* (4), and does not call for further notice.

In the result, in our view, the plaintiff's suit was rightly decreed and this appeal is dismissed with costs.

Appeal dismissed.

(1) (1920) I L R, 42 All, 570
(2) (1889) I L R, 12 All, 440
(3) (1923) I L R, 47 Mad., 63.
(4) (1923) I L R, 47 Mad, 288.

Before Justice Sir Cecil Walsh and Mr Justice Banerji

1927
April, 13

MADHURI SARAN (JUDGEMENT-DEBTOR) *v* BISHAMBHAR NATH AND OTHERS (AUCTION-PURCHASERS) *

Civil Procedure Code, order XXI, rule 89—Execution of decree—Application to set aside sale—Deposit of the amount by judgement-debtor and his mortgagee—Validity of.

Certain judgement-debtors whose property had been sold in execution of a decree executed a mortgage of the property, and then the mortgagees and themselves, by means of separate applications, paid into court the amount needed to get the sale set aside, one party tendering approximately two-thirds and the other one-third

Held, that there was nothing illegal in payment being made in this way, the two payments should be treated as one and as being the payment of the judgement-debtors *Sarvi Begum* v *Haider Shah* (1), distinguished

THE facts of this case are fully stated in the judgement of the Court.

Dr *Surendra Nath Sen* and Pandit *Uma Shankar Bajpai*, for the appellant

Dr. *Kailas Nath Katju* and Munshi *Shambhu Nath Seth*, for the respondents

WALSH and BANERJI, JJ.—This is a judgement-debtor's appeal Certain property was advertised for sale and the estimated value of that property, as entered in the sale proclamation by the court, was Rs. 8,000 On the 20th of April, 1926, the property was actually sold for Rs. 14,000 and the decree-holder purchased the property at the auction. The amount which was due to the decree-holder, as entered in the sale proclamation, was Rs 13,671-6-4 On the 17th of May, 1926, the judgement-debtors executed a mortgage in favour of

* First Appeal No 148 of 1926, from an order of Sarup Narain, Subordinate Judge of Cawnpore, dated the 14th of June, 1926

(1) (1911) 9 A L J , 12

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MADHURI SARAN v. BISHAMBHAR NATH.

Ram Kumar and others of the share sold at auction on the 20th of April, 1926, for a sum of Rs. 10,000. On the 18th of May, 1926, two applications were presented to the Subordinate Judge. One was by Ram Kumar and others as mortgagees, who tendered and deposited a sum of Rs. 10,000 and in their application stated that if the judgement-debtor did not deposit the balance payable and if the sale was not set aside, this sum might be returned to Ram Kumar. The judgement-debtors in their application stated that a sum of Rs. 10,000 had been deposited by the mortgagees under a tender and that they were depositing a sum of Rs. 4,810 and prayed that the sale be set aside and also stated that the total amount was more than the amount payable under the law to the decree-holder They, therefore, prayed that the remaining amount might be returned to them. The office reported for the information of the Judge that the amount deposited was correct and that out of the total amount Rs 10,000 had been deposited by the mortgagees and Rs. 4,810 by the judgement-debtors. On notice of this application of the judgement-debtor's having been served on the decree-holders, they objected on the ground, among others, that there was no compliance with order XXI, rule 89, inasmuch as the whole amount had not been deposited by the judgement-debtors and that the mortgagees had no *locus standi* to make any deposit. They further urged that the deposit being a conditional deposit could not be treated as a valid deposit. The learned Subordinate Judge has declined to set aside the sale by his order of the 14th of June, 1926, which is under appeal. He has held that "if there had been a joint application on behalf of the judgement-debtor

and the mortgagees, then there would not have been any difficulty." He has also held that the deposit made by the mortgagees was not on behalf of the judgement-debtors. We are of opinion that the two applications must be treated on the whole as one. The application of the judgement-debtors clearly referred to the fact of the deposit having been made in the name of the mortgagees. The mortgagees independently may not have been able to apply to have the sale set aside, but we are of opinion that the transactions must be treated as one and that the judgement-debtor complied with the provisions of order XXI, rule 89, by depositing the whole amount within thirty days The plea that the deposit was a conditional deposit is really without any force as the condition only related to what would happen in case the learned Subordinate Judge did not set aside the sale, and we think that it was not a condition precedent to anything to be done by the court. The case of *Sarvi Begum* v *Haider Shah* (1), is clearly distinguishable In that case there was no application by the judgement-debtor at all. The amendment of the rules by the rule-making powers has made the point raised in this case clear. We think, however, that the costs of this appeal should be paid by the appellant.

We, therefore, set aside the sale of the 20th of April, 1926 The decree-holders will be paid the amount due to them by the court

Appeal allowed

(1) (1911) 9 A L J , 12.

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April, 11

Before Justice Sir Cecil Walsh and Mr Justice Banerji

DEORAJ MISRA (PLAINTIFF) *v.* ABHAI RAJI (DEFENDANT).*

Act No X of 1873 (Indian Oaths Act), section 11—Suit against a minor—Agreement by guardian that the suit should be decided according to the statement of a referee.

In a suit for restitution of conjugal rights brought against a minor under the guardianship of her sister, the parties entered into an agreement that the case should be decided according to the statement made by a certain pleader The court accepted the agreement and examined the pleader, and decided the suit, on his statement, in favour of the plaintiff

Held, that the decision so arrived at was a perfectly valid decision and binding on the minor defendant *Parbhu Dayal* v *Jamil Ahmad* (1), and *Wasi-uz-zaman Khan* v *Fazza Bibi* (2), referred to

THIS was an appeal by the plaintiff under the following circumstances :—

A suit was instituted by the appellant against Musammat Abhai Raji, a minor, who was represented by her guardian Musammat Umrai in the courts below, for restitution of conjugal rights. The trial court framed four issues. After some evidence had been recorded, the parties presented an application signed by their pleaders to the effect that parties would be bound by the statement of Munshi Balgobind Prasad, pleader On this application being presented, the court accepted the prayer of the parties, and, on the 21st of December, 1925, Munshi Balgobind Prasad was examined and his statement recorded. The learned Munsif thereupon decided the issues in the case according to the statement of Munshi Balgobind, the result of which was that the

* First Appeal No 138 of 1926, from an order of Kali Das Banerji, Additional Subordinate Judge of Jaunpur, dated the 13th of July, 1926

(1) (1921) I L R, 44 All, 117 (2) (1915) I L R, 38 All, 181.

plaintiff's suit was decreed. Musammat Abhai Raji went up in appeal before the learned Additional Subordinate Judge of Jaunpur. He set aside the judgement and decree of the lower court and sent the case back to the Munsif for re-trial on the merits, holding that Musammat Abhai Raji was not bound by the agreement entered into by her guardian and sister Musammat Umrai, defendant No 2 The attention of the learned Judge was called to the case of *Parbhu Dayal* v. *Jamil Ahmad* (1) He held that the agreement would be a sort of compromise, and, therefore, its validity required sanction of the court, and as no such sanction had been given by the Munsif in this case, it was not binding upon the defendant The plaintiff appealed

Mr. *A Sanyal*, for the appellant.

Munshi *Girdhari Lal Agarwala*, for the respondent

The judgement of the Court (WALSH and BANERJI, JJ), after stating the facts as above, thus continued :—

We are of opinion that the learned Judge is clearly wrong and misconstrued the observations of the learned Judges who decided the case of *Parbhu Dayal* v *Jamil Ahmad* (1). We are of opinion that the minor was bound by the statement made by Munshi Balgobind Prasad in view of the clear provision of section 11 of the Indian Oaths Act, 1873.

The learned vakil appearing for the respondent has argued that the petition, which was presented to the court, having been signed only by the pleaders and not by the parties, the defendant was not bound by the undertaking, as under the vakalatnama special power was not given to refer the matter We are of

(1) (1921) I L R, 44 All, 117

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DEORAJ MISRA v. ABRAI RAJI

opinion that there is no force in this contention. See the case of *Wasi-uz-zaman Khan* v. *Faiza Bibi* (1). It was also submitted by the learned vakil for the respondent that the provisions of sections 9 and 10 of the Indian Oaths Act, 1873, could only apply, by reason of section 8, to reference to a party to the case or a witness. We are unable to follow that argument, as in our opinion when Munshi Balgobind Prasad gave his statement before the court he was a witness who had been specially referred to by the parties

We, therefore, set aside the order of the lower appellate court and restore that of the court of first instance with costs.

Order set aside

REVISIONAL CRIMINAL.

Before Justice Sir Cecil Walsh and Mr. Justice Banerji

1927
April, 14

EMPEROR *v* HIMAYATULLAH*

Criminal Procedure Code, section 109—Interpretation of—"Within the local limits of such Magistrate's jurisdiction"—"Satisfactory account of himself"

Held, on a construction of section 109 of the Code of Criminal Procedure, that (1) the words "within the local limits of such Magistrate's jurisdiction" as used in section 109 (*a*) are part of the predicate "to conceal his presence" *Emperor* v *Bhairon* (2), followed.

(2) A person living within the territorial jurisdiction of a Magistrate trying the case, who takes steps to conceal that he is there, by removing himself from one part to another, may be within the section

* Criminal Revision No 718 of 1926, from an order of A G P Pullan, Sessions Judge of Moradabad, dated the 16th of September, 1926

(1) (1915) I L R, 38 All, 131 (2) (1926) I L R, 49 All., 240

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(3) A man who is deliberately preparing to commit a burglary and when caught by the police admits his intention, is not, for this reason only, a person who "cannot give a satisfactory account of himself" within the meaning of the section.

The words "satisfactory account" as used in section 109 mean satisfactory in accordance with the known facts that are consistent with the surrounding circumstances.

THE facts of this case were as follows:—Himayatullah was seen at night in the town of Sambhal, of which he was a resident, scantily dressed and carrying a "burglar's tool," namely a piece of iron usually known as a *sabhar*. A number of policemen, who were in ambush, sprang up behind him shouting "thief," and he ran away. Proceedings were taken against him under section 109 of the Code of Criminal Procedure and he was ordered to execute bonds and to furnish security to be of good behaviour for one year. He appealed and the appellate court (Sessions Judge) found that there was no proof that the accused had no ostensible means of subsistence and that the question of whether he could or could not give a satisfactory account of himself had not been clearly decided. The Sessions Judge held that the section did not apply to the facts of the case and he set aside the order under section 109 The Local Government applied in revision to the High Court.

Pandit *Uma Shankar Bajpai* (Government Advocate), for the Crown.

The opposite party was not represented.

WALSH and BANERJI, JJ.:—This is an application on behalf of the Local Government against an order of the Sessions Judge of Moradabad setting

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aside an order of a Magistrate of the first class directing the opposite party to execute a personal bond with two sureties to be of good behaviour, under section 109 of the Code of Criminal Procedure.

Three points have been urged by the learned Government Advocate in support of this revision. The first point urged is that the words "to conceal his presence within the local limits of such Magistrate's jurisdiction" in section 109 of the Code of Criminal Procedure are words defining the tribunal which has jurisdiction to try the case. In the case of *Emperor* v *Bhairon* (1) it is laid down that the words "within the local limits of such Magistrate's jurisdiction" are part of the predicate "to conceal his presence" We have no doubt whatever that the meaning of those words was rightly given in that case It is clear from the provisions of section 5 in Chapters II and III and schedule 3, Part I (5), that these words cannot have any other meaning

It may be that a person, living within the territorial jurisdiction of a Magistrate trying the case, who takes steps to conceal that he is there, namely, by removing himself from one part to another, such as from Allahabad to Naini, or from one village of a tahsil to another, and, when he gets to the new place, disguising his identity or hiding his person, is within the section, and we do not think that the case of *Emperor* v. *Bhairon* (1) can be read as having negatived that and as having laid down that a person must go into the district from a place quite outside.

The second point urged is that when a burglar starts out to commit a burglary and lurks behind, it amounts to "take precaution to conceal his presence." A man who is deliberately preparing to

(1) (1926) I.L.R., 49 All., 240

commit a burglary and when caught by the police admits his intention, cannot be dealt with under the provisions of section 109. If a man preparing to commit a crime announces his intention to the police at the time when he prepares to carry out his intention, the action of the police is all the preventive that is required in the public interest.

The third point urged was that the opposite party had upon the facts found in this case failed to give a satisfactory explanation of his presence. The opposite party according to the findings was a man known to the police On him were found a jemmy, a bunch of keys, a box of matches and a stick of lac He was also said to be scantily dressed We do not think that it could be said that the opposite party failed to give a satisfactory account of his presence at a particular locality at a precise time We think that the words " satisfactory account " as used in section 109 mean satisfactory in accordance with the known facts that are consistent with the surrounding circumstances.

We, therefore, dismiss this application

Application dismissed.

MISCELLANEOUS CIVIL.

Before Mr Justice Mukerji and Mr Justice Daniels.

1924 December, 16.

TULA RAM SAH AND OTHERS (PLAINTIFFS) *v* SHYAM LAL SAH AND ANOTHER (DEFENDANTS).*

Hindu law—Effect of migration on the personal law of a Hindu—Custom—Mode of proof of—Compilation made by a Government servant at the instance of the Government—Act No I of 1872 (Indian Evidence Act), sections 35 and 57—Kumaun.

A court would be justified in assuming *primâ facie* that the law applicable to a Hindu is that prevailing among his caste-fellows in the locality, unless he specifically denies that this is so and sets up the case that he has migrated from another part of India and continues to follow the law which prevailed in his original place of domicile

An officer of the Indian Civil Service was deputed by the Local Government to inquire into and collect the customs that were prevailing in Kumaun. The officer did so, and wrote a report which was published under the authority of the Government

Held, that a court administering civil law in Kumaun was justified in accepting this report as *primâ facie* evidence of the customary law applicable to Kumaun and in throwing upon the party who disputed the existence of a custom therein set forth the burden of proving that no such custom existed and that the ordinary Hindu law applied

THE facts of this case sufficiently appear from the judgement of MUKERJI, J.

Pandit *Kashi Narain Malaviya*, for the applicants

Dr *Kailas Nath Katju*, for the opposite parties.

MUKERJI, J.:—This is a reference under rule 17 of the Kumaun Rules by the Local Government for the opinion of this Court.

The facts, which have given rise to this reference, are briefly these. A Hindu resident of Kumaun, by caste a Vaish, namely, Lachi Ram, died and he was

* Miscellaneous Case No 277 of 1924

succeeded by his wife Musammat Nimja. He left him surviving, besides the wife, a daughter and two daughter's sons. The daughter's sons were the defendants in this suit out of which this reference has arisen At the time when Nimja died, three of the brothers of Lachi Ram were living, namely, Tula Ram, the plaintiff, and Parsi and Gangi, the respective fathers of the two other plaintiffs The plaintiffs claimed that by the custom obtaining in Kumaun they were entitled to the property of Lachi Ram to the exclusion of his daughter's sons. To this claim the defendants filed a written statement and denied the existence of the custom. They pleaded that they were entitled under the Hindu law to succeed to the grandfather. They never stated that they had come from any other part of the country or that they had carried with them any local law or local custom.

Mukerji, J.

The learned District Judge of Almora heard the evidence, discussed it and came to the conclusion that the evidence produced by the plaintiffs was not sufficient to establish the custom which they had pleaded. There was an appeal to the High Court of Kumaun, and the learned Commissioner, who presided over that Court, was of opinion that the plaintiff ought to succeed. It appears that the Local Government deputed Mr Panna Lal, I C S , to inquire into and collect the customs that were prevailing in Kumaun. Mr Panna Lal has accordingly written a book in which he has stated the different customs which he found prevailing in that area The learned Commissioner was of opinion that in view of the fact that a record of custom was made by Mr. Panna Lal after an elaborate inquiry, he was entitled to accept the statements in the book as affording good *primâ facie* evidence of the law prevailing in Kumaun, in preference to the law as found in the Hindu text-books.

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Mukerji, J.

He accordingly threw the burden of proof on the defendants to establish that they were entitled to succeed in the teeth of the Kumaun custom, namely, the custom which excluded a daughter or daughter's son from inheritance. The learned Commissioner also examined the evidence on record, and was satisfied that a custom had been established to his satisfaction.

The defendants went up to the Local Government and at their instance the present reference has been made.

The questions sent to us for answer are as follows —

(1) Was the Commissioner right in refusing to apply the provisions of the *Mitakshara* law to a family of Vaishyas now resident in Kumaun, but who previously migrated from Rajputana? [Cf *Jawahir Lal* v *Jarau Lal* (1)]

(2) Was the Commissioner justified in accepting Mr Panna Lal's book as a definite authority on customary law, and in throwing the burden of proof not on the parties alleging but on the parties denying a custom which is contrary to the *Mitakshara* law?

With reference to the first question, it will be noticed that it has been contended on behalf of the defendants that they were Vaishyas who originally resided in Rajputana and migrated to Kumaun. I have already indicated that in the written statement no such case was set up. There is no such case, no such pleading, and there was no issue on the point. In the circumstances, the Commissioner was right in accepting the statement of law contained in the report of Mr Panna Lal and in declining to apply the provisions of the *Mitakshara* law.

It is to be mentioned that under the Hindu law itself, custom stands supreme to the written laws.

(1) (1924) I L R , 46 All , 192

In the case of *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1) their Lordships of the Privy Council said —" Under the Hindu system of law clear proof of usage will outweigh the written text of law." It being the fact that the parties were residents of Kumaun, and it being the fact that Mr. Panna Lal's book purported to contain a statement of law prevailing in Kumaun, the Commissioner was right in applying what should be taken as a good *primâ facie* evidence of the local custom If anybody wanted to plead that no such custom obtained or for any particular reason the local custom did not apply to him, it was for that party to say so specifically. It is true, as held in the case quoted in the letter of reference, namely, *Jawahir Lal* v. *Jarau Lal* (2), that when a Hindu migrates, he is entitled to carry his own law, that is to say, the personal law, from his home of origin to the new place. He may continue to observe those rules or laws or may abandon them; but where the law to be pleaded is different from the law prevailing in the locality, it must be on the party who pleads that law to say so Under the circumstances, I am of opinion that the Commissioner was right in the way he acted.

Coming to the question No 2, we have to say what is the weight to be attached to Mr. Panna Lal's book I have already stated that Mr Panna Lal was directed by the Local Government to hold an inquiry as to the customs prevailing in Kumaun. He was, therefore, acting under the orders of the Government and his inquiry was carried on under the provisions of section 35 of the Indian Evidence Act. We have numerous authorities to establish that entries as to customs recorded in the *wajib-ul-arz* are good evidence and admissible under section 35 of the Evidence Act. The reason is this that the record has been

(1) (1868) 12 Moo I A, 397 (486). (2) (1924) I L R, 46 All, 192

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made after due inquiry. In the case of *Balgobind* v. *Badri Prasad* (1) their Lordships of the Privy Council found a single entry in a *wajib-ul-arz* enough to establish a custom that had been pleaded before them. If a *wajib-ul-arz* may be admitted into evidence and given the weight that has been attached to it, the record prepared by Mr. Panna Lal is certainly entitled to much more weight. The book written by Mr. Panna Lal will be admissible under section 57 of the Evidence Act without further proof that it is a book written by him If we attach to Mr Panna Lal's book the weight to which it is entitled, we must say that it is a definite evidence on customary law as prevailing in Kumaun My answer to the rest of the question has practically been given in answering the question No. 1. To put it shortly, I would answer this question also in the affirmative and say that, in view of the circumstances, the Commissioner was justified in accepting Mr. Panna Lal's book and in throwing the burden of proof on the defendants.

DANIELS, J. :—I agree and merely desire to add a few words in consideration of the extreme importance of the questions involved in this reference. The first question is—

> "Was the Commissioner right in refusing to apply the provisions of the *Mitakshara* law to a family of Vaishyas now resident in Kumaun, but who previously migrated from Rajputana?" [Cf. *Jawahir Lal* v *Jarau Lal* (2).]

If the question had been put as an abstract proposition of law the answer to it admits of no doubt. The Privy Council in the case of *Balwant Rao* v. *Baji Rao* (3) lay down four propositions :—

First, that *primâ facie* a Hindu residing in any particular province of India is governed by the law of that province

(1) (1928) I L R , 45 All., 413 (2) (1924) I.L.R , 46 All , 192.
(3) (1920) I L.R , 48 Calc , 30

Second, that if any such family migrates to another province it carries its own law with it.

Third, that any such family may renounce its original law and adopt the law of the province to which it migrates, but that such renunciation must be proved by evidence.

Daniels, J.

Fourth, that the personal law which a migrating Hindu carries with him is the law as it stood at the time of the migration

The question put by the Local Government is, however, whether *in this case* the Commissioner was right in refusing to apply the provisions of the *Mitakshara* law to a family of Vaishyas now resident in Kumaun, but who previously migrated from Rajputana. We have no hesitation in saying that he was right in so refusing and for the following reasons. First, it was no part of the case of the defendants that the family were governed by any different law from that prevailing among their caste in Kumaun nor was any issue framed on this point. Secondly, the statement that the parties originally migrated from Rajputana is based on the evidence of three witnesses, namely Thakur Das Sah, Bansi Lal Sah and Ram Lal Sah, and all these witnesses, while stating that their family migrated from Rajputana many generations ago, state at the same time that the family is at present governed by the customs prevailing in Kumaun. It may be noted further that these witnesses, though it is true that they belong to the same clan of *Jagati* Sahs as the parties, made no statement as to the family of the parties, but only as to their own family.

On the second question I also agree with my learned brother that the answer must be in the affirmative. It appears to me that the question as put

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Daniels, J.

involves a certain misunderstanding of what the Commissioner really did Undoubtedly the burden of proving a custom at variance with Hindu law lies in the first place on the person who sets it up. The burden of proof is, however, liable to be shifted by the evidence adduced by the parties If the plaintiffs produced *primâ facie* evidence of the existence of the custom the burden was thrown on the defendants to rebut it In this case the plaintiffs did produce *primâ facie* evidence in the shape of Mr. Panna Lal's report. That report was clearly admissible in evidence under section 35 of the Evidence Act, being a public record made by a public servant in the discharge of his official duty. Where evidence is admissible, the weight to be attached to that evidence is a matter for the court which has to decide on the facts, but we are certainly not prepared to say that the Commissioner was wrong in attaching very great value to that evidence. It appears from the book itself that the record was prepared after an exhaustive inquiry, in the course of which as many as 20,000 witnesses were examined by Mr. Panna Lal and his assistant. The reason which led to Mr. Panna Lal being placed on special duty to prepare this record was that there was a danger of Kumaun customs being disregarded by the courts owing to the inability of parties to produce the necessary evidence in individual cases, and it would be a grave public misfortune if the courts were to be precluded from attaching to that record the value to which the circumstances under which it was prepared naturally entitle it

The principles on which the record is admissible are precisely those on which an entry in a *wajib-ul-arz* is admitted as evidence of custom. The language

used by the Privy Council in *Ramkishore* v. *Jainarayan* (1) in dealing with a record of tribal custom prepared in the Gurgaon district in the Punjab applies with even greater force to Mr Panna Lal's report What the Commissioner did in this case was to treat the report as *primâ facie* evidence of the existence of the custom which it was open to the defendants to rebut, but which was sufficient to establish the plaintiffs' case unless and until it was rebutted He held and rightly that it had not been rebutted, and further that there was other evidence of very great weight which went to establish the custom in question. He was fully entitled to accept the report as *primâ facie* evidence and, having so accepted, to throw on the other side the burden of rebutting it by other evidence This is my answer to the reference.

BY THE COURT.—For the reasons given above we answer the first question in the affirmative. The second question as put makes an erroneous assumption and cannot, therefore, be answered by a simple affirmative or negative Mr Panna Lal's report was not admitted by the Commissioner as an authoritative statement of the law, but as a *primâ facie* evidence of a fact, namely, the existence of a custom Our answer to that question, therefore, is that the Commissioner was right in accepting Mr. Panna Lal's report as *primâ facie* evidence of the existence of a custom, applicable to the community to which the parties belong, excluding daughters and daughters' sons from inheritance, and in throwing on the defendants the burden of rebutting it We think that the costs of this reference should be borne by the applicants.

(1) (1921) I L R , 49 Calc , 120

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr Justice Lindsay and Mr. Justice Banerji

1927
February, 24

EMPEROR *v* KALI CHARAN SHARMA *

Criminal Procedure Code, sections 99A to 99G—Act No. XLV of 1860 (Indian Penal Code), section 153A—Application to set aside order of forfeiture—Burden of proof—Intention of author of proscribed book.

Held, that where an application is made under section 99B of the Code of Criminal Procedure to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of section 153A of the Indian Penal Code, it is for the applicant to convince the Court that, for the reasons he gives, the order is a wrong order

If the High Court is left in doubt, after hearing the application, it should set aside the order.

Held, also, that if the language of a book is of a nature calculated to produce or to promote feelings of enmity or hatred between two classes of His Majesty's subjects, the writer must be presumed to intend that which his act was likely to produce. *The King* v. *Burdett* (1), referred to.

A violently abusive and obscene diatribe against the founder or prophet of a religion or against a system of religion may amount to an attempt to stir up hatred or enmity against the persons who profess that religion

THIS was an application to set aside an order of forfeiture of a book called "*Bichitra Jiwan*" passed by the Local Government under section 99A of the Code of Criminal Procedure. The facts of the case sufficiently appear from the judgement of LINDSAY, J.

Munshi *Narain Prasad Ashthana*, Munshi *Panna Lal* and Babu *Surendra Nath Varma*, for the applicant.

The Government Advocate (Mr. *G. W. Dillon*), for the Crown

* Criminal Miscellaneous No 9 of 1927.
(1) (1820) 4 B. and Ald., 95(120).

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EMPEROR v. KALI CHARAN SHARMA.

LINDSAY, J.:—This case arises from an application made by Pandit Kali Charan Sharma under section 99B of the Code of Criminal Procedure as amended by Act XXXVI of 1926.

The applicant is the author of a book written in Hindi and entitled "*Bichitra Jiwan*," which was first published at Agra in November, 1923, and which purports to treat of the life of the prophet Muhammad

In October last the Local Government of these provinces took action under the powers conferred by section 99A of the Code (as amended by the Act above mentioned) and declared the book to be forfeited to His Majesty on the ground that it contains matter the publication of which is punishable under section 153A of the Indian Penal Code

By the application now before us we are asked to set aside this order of the Local Government on the ground that the book does not contain such matter as is referred to above In support of his application Pandit Kali Charan pleads—

(1) that he has taken his facts and material from authoritative Muslim literature and standard works on Islam and Muhammad by European as well as Indian writers,

(2) that by writing the book it was never his intention to promote or to attempt to promote feelings of enmity or hatred between different classes of His Majesty's subjects,

(3) that he wrote the book in a spirit of fair and honest criticism without any malicious intention of producing hatred; and

(4) that as a preacher of the Arya Samaj his propaganda is mainly confined to reclamation (*shudhi*)

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of the Hindus from other religious and especially from Islam.

For these reasons he contends that the order of forfeiture is erroneous, as the book does not offend against the law, and the question we have to decide is whether, for the reasons just stated, the order is liable to be set aside.

Lindsay, J

When the case was opened there was some discussion regarding the onus of proof, it being contended on behalf of the applicant that it lay upon the Government to establish that the order complained of was justified by law Speaking for myself I feel clear that this argument is not well founded in view of the language of section 99B. Where an application is made under that section to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of section 153A of the Indian Penal Code, it is, in my opinion, for the applicant to convince the court that, for the reasons he gives, the order is a wrong order.

For the purposes of this case the point is, perhaps, not one of practical importance and the Government Advocate who appeared for the Crown undertook to support the order and did so. As, however, the question of onus was definitely raised I have thought it proper to express my opinion in the sense indicated above.

To pass on to an examination of the nature of the contents of the book, I would refer, in the first place, to the title which it bears The short title is "*Bichitra Jiwan*" (Strange or Wonderful Life). A longer and alternative title, displayed on the front page is "*Muhammad Sahib ke jiwan ki bichittra aur rahasya-mayi ghatnaen*" which may, I think, fairly be rendered in English by the expression "strange

and diverting episodes in the life of Muhammad Sahib," though the Hindi word "*rahasya*" may also be translated as "private" or "secret," the fact being that the word "*rahas*" has a variety of meanings, most of which, however, are associated with the notion of pleasure or merriment.

Lindsay, J.

The book contains a preface (*Nivedan*) in which the author sets out the occasion for his writing it He states that people who speak and read the Hindi language have hitherto had little or no opportunity of becoming acquainted with the religion of Islam, and goes on to say that at a time when persons like Khwaja Hasan Nizami are laying themselves out by secret methods to entrap Hindus in the snare of Islam, it is necessary that a book should be written in Hindi to teach Hindus something about the tenets of the Muhammadan religion.

[His Lordship then examined the nature of the contents of the book and proceeded as follows :—]

After this survey of the contents and language of the book a word or two may properly be said about the circumstances in which it came to be published. It made its appearance in November, 1923, and has run through three editions The writer has admitted before us that some 6,000 copies of it have been given away or sold by way of propaganda in furtherance of the "*shudhi*" movement

This movement was set on foot at or about the time this book was published and has for its principal object the reclamation from Islam of converts from Hinduism, of whom there are many in the western districts of these provinces. This campaign of reconversion started at a time of more than usual tension between the Hindu and Muhammadan communities and led to a counter campaign on the part of the

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Lindsay, J

Muhammadans. It is a matter of notoriety that these movements have excited bitter animosity which has since expressed itself at frequent intervals in violent collisions between the followers of the two religions

The book, then, made its appearance at a time of unsettlement and excitement and has been widely distributed since its publication. According to what was stated by the author in the witness-box a second edition of 3,000 copies was printed and has been exhausted. A second edition copy before us shows that it was printed in February, 1925.

It is said that it was written in the Hindi dialect and printed in the Devanagri character for the use of Rajput converts, but it clearly must have been intended for a wider circle, namely, Hindus in general: that is clear from the language of the preface itself. "I wrote the book because I am a missionary of the Arya Samaj. I do *shudhi* work in order to try to convert people to the Vedic religion and to prevent my people from becoming Muslims." These are the words used by the writer in the course of his examination before us The appeal is thus to Hindus as a class.

The question then is as to the intention of the writer. Has he by this book promoted or attempted to promote feelings of enmity or hatred between two classes of His Majesty's subjects, the Hindus and the Musalmans?

This matter must be judged primarily by the language of the book itself, though it is permissible to receive and consider external evidence either to prove or to rebut the meaning ascribed to it in the order of forfeiture.

If the language is of a nature calculated to produce or to promote feelings of enmity or hatred, the

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writer must be presumed to intend that which his act was likely to produce. This was the principle laid down by BEST, J., in *Burdett's* case (1) in dealing with a case of seditious libel, and the same principle clearly applies to the case of a publication punishable under section 153A of the Penal Code. Applying this test to the case before me I can only say that in my opinion the natural, indeed the inevitable, consequence of writing such as I find in this book is the excitement of enmity or hatred or both between the followers of the Hindu and Muhammadan religions.

Lindsay, J.

The learned counsel for the applicant, while admitting that the book must be painful to Muhammadans, insulting to their prophet and their religion and frankly obscene in parts, has contended (if I have understood him rightly) that his client as a missionary, zealous for his religion, was entitled to collect and place before Hindus all the materials to be found in this book in order to prevent their being attracted towards Islam. It is suggested that for a missionary in the exercise of his calling it is legitimate to employ all means to excite hatred of a rival religion and that it is not to be inferred that because he does so he is necessarily attempting to engender hatred or enmity against the persons who profess it And so it is argued here that because Pandit Kali Charan has written a violent, abusive and obscene diatribe against Muhammad we ought not to conclude that there is any evidence of an attempt to stir up strife against the followers of the prophet. That indeed is the plea of the Pandit in his petition (see paragraph 8) with which may also be read the plea in paragraph 9 to the effect that the book was written " in a spirit of fair and honest criticism without any malicious intention of producing hatred." As regards this last plea I would only observe that I

(1) (1820) 4 B and Ald., 95(120)

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Lindsay, J

have failed to discover in the book any traces of "fair and honest criticism." On the contrary I can find nothing but obscene abuse.

I am not prepared to assent to the proposition that there is no limit to the licence permitted to a missionary in the advocacy of the merits of his own religion, nor am I able to appreciate the distinction between an attack upon a system of religion in the abstract and one upon the people who believe in it. I do not think it is humanly possible to hold up to obloquy and derision a religious belief without stirring up resentment and hatred on the part of those who accept it as their creed.

We have heard the evidence of one Abdul Majid who is one of the persons who complained to the Government against this publication. He has told us how the book first came to his notice and has described the excitement created in the principal mosque at Agra when a few extracts from the book were read out to the Muslim congregation on the last Friday in Ramzan

Abdul Majid declares that if Government had not interfered to suppress the book he would have felt impelled to murder the author. He further declares that but for restraint put upon them by one of their leaders his co-religionists would probably have joined in a massacre of Hindus. This, indeed, is strong language, but I have no reason to suppose that it does more than express the vindictive feelings which were roused by the recital of passages from the book of Pandit Kali Charan, and it is sufficiently plain that the argument that an attack upon a religion does not necessarily involve an attack upon its adherents possesses no merits in the eyes of the Muslims of Agra

It must, of course, be recognized that in countries where there is religious freedom a certain latitude

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must of necessity be conceded in respect of the free expression of religious opinions together with a certain measure of liberty to criticize the religious beliefs of others, but it is contrary to all reason to imagine that liberty to criticize includes a licence to resort to the vile and abusive language which characterizes the book now before me

I have sought, therefore, to judge the intention of the writer from his own declarations in the book, from the nature of the language he has used and from the circumstances in which the book was published, and I cannot entertain any doubt, in spite of the author's protestations to the contrary, that the book was conceived and written with the deliberate intention not only of exciting odium against the founder of the Muhammadan religion but of promoting in Hindus feelings of hatred or enmity against their Muslim fellow-subjects.

I pay no attention to the plea that the statements contained in the book are supported by authority; in cases like these the truth of the language can neither be pleaded nor proved; it is immaterial For these reasons I am of opinion that this application should be rejected.

BANERJI, J. —I agree. The question is as to what was the intention of the writer of the book Did he promote or attempt to promote feelings of enmity or hatred between the Hindus and Muhammadans? The principle applying to cases of seditious libel applies to the case of publication punishable under section 153A of the Indian Penal Code I have carefully read the book from end to end and I have no hesitation in holding that the author must be held to have written the book intending to promote feelings of hatred between the Hindus and the Musalmans The whole tenor of the book suggests to my

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mind that the object can be no other and I am not prepared to believe the statement of Kali Charan that he wrote the book as a missionary and in the exercise of legitimate rights to induce people to embrace Hinduism.

WALSH, A. C. J. —I agree. I agree also as to the procedure. I think that the explanation of section 99D of the Code of Criminal Procedure is that if the High Court is left in doubt after hearing the application it should set aside the order, which may be said to be contrary to the ordinary practice in an appeal in a civil suit.

BY THE COURT.—The order of the Court is that this application is dismissed with costs, including a fee of Rs. 300 to the Government Advocate.

Application dismissed.

REVISIONAL CRIMINAL.

Before Mr Justice Ashworth.

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April, 19

EMPEROR *v.* SAID AHMAD AND ANOTHER.*

Act No XLV of 1860 (*Indian Penal Code*), *section* 459—*House-breaking—Causing of grievous hurt after the entry is completed*

Held, on a construction of section 459 of the Indian Penal Code, that the offence of house-breaking is complete when entry into the house is effected and any grievous hurt subsequently caused by the persons breaking into the house cannot be said to be grievous hurt caused while they were committing the house-breaking.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Mr. *Sayed Mohammad Husain*, for the applicants.

* Criminal Revision No. 169 of 1927, from an order of K. G. Banerji, Sessions Judge of Ghazipur, dated the 18th of February, 1927.

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The Assistant Government Advocate (Dr *M. Wali-ullah*), for the Crown.

ASHWORTH, J. —These two cases are connected and are based on two separate applications to this Court to exercise its power of revision under section 439. The facts which are necessary to explain these applications before me are these On the 26th of September, 1926, at 9 a m., the Kotwal of Ghazipur, by name Ram Karan Singh, and Suraj Nath Singh, the Excise Inspector, having obtained a warrant to search the house of one Mohit Khan for illicit opium, proceeded to the block of buildings in which that house is situated and in which are said to be situated also the houses of Farrukhsher Khan and Musammat Amina Bibi. The Kotwal directed some constables to scale a wall There is disagreement as to what wall it was or as to whose property was invaded thereby. A dispute arose in the house inside the block of buildings and Farrukhsher Khan was injured The police instituted a case against Farrukhsher Khan and other persons for rioting and possession of opium and for causing hurt to the police officers. Subsequently Farrukhsher Khan filed a criminal complaint, complaining against the police of house-breaking and other offences, and later on Musammat Amina Bibi and two others filed a similar complaint I may mention that I regard as immaterial the sections of the Indian Penal Code which these persons stated to be applicable to the offences complained of Both these complaints against the police were entertained, after some further inquiry, by the Magistrate who had taken cognizance of the police complaint. The two cases against the officers were combined (so far as I can see, very properly) in one case The Magistrate heard the evidence for the prosecution and recorded the statements in explanation of the accused officers.

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He then framed charges but refused to frame a charge under section 459, Indian Penal Code, namely, the offence designated as "grievous hurt caused while committing house-trespass or house-breaking" The section in full is as follows:—

"Whoever, whilst committing lurking house-trespass or house-breaking, causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, shall be punished with transportation for life or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine"

An offence under this section is triable exclusively by the Court of Session. In the criminal revision case before me, No. 169 of 1927, the application is that the High Court should direct a charge to be framed under this section and the case to be committed to the Court of Session.

The question then is whether the evidence read along with the explanations of the accused, in the case against the police, justified and required a finding by the Magistrate that *primâ facie* an offence under section 459 had been committed. If it did so, it is clear that the Magistrate should have committed to the Court of Session as he had no jurisdiction to try such an offence himself.

The Magistrate has put on the record his reasons for holding that no offence under section 459 could be held to be established His reason is this in brief The offence of house-breaking is complete when entry into the house is effected and any grievous hurt, subsequently caused by the persons breaking into a house, cannot be said to be grievous hurt caused while they were committing the house-breaking. I was at first disposed, on reading the section, to hold that this was taking too narrow a view of the language of it But, on consideration of the section with the connected

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sections of the Indian Penal Code, I think that the Magistrate was correct in his view. House-breaking as defined in section 445 is an aggravated form of criminal trespass as defined in section 441. One form of criminal trespass under section 441 is the act of entering upon property in the possession of another, with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. If the property is used as a human dwelling, the offence of criminal trespass becomes the offence of house-trespass. (*Vide* section 442.) If this offence of house-trespass is further aggravated by an entry or departure of a forcible nature, then the entry passes from an offence merely of criminal trespass to the more serious offence of house-breaking (*Vide* section 445.) The offence of house-breaking may be further aggravated by causing grievous hurt to any person whilst committing the house-breaking. The question then is, when is a house-breaking complete? Having reference to what has been stated by me, it is clear that it is complete when the act of entering into the house is complete. Section 442 shows that entry is completed by the introduction of any part of the trespasser's body into the house. In its origin, too, the word "trespass" meant the momentary act of "passing over".

So far the matter appears to me plain sailing. A doubt, however, is created by the fact that the definition given above of criminal trespass is not complete. The second clause of section 441 defines another form of criminal trespass arising from unlawfully remaining on property, after having lawfully entered, with intention to intimidate, insult or annoy or to commit an offence. This second offence *primâ facie* would appear to continue until the person left the property. If this were so, the view of the Magistrate as to the

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meaning of section 459 would appear open to the following objection If a person made an unlawful entry into a house and while in the house caused grievous hurt to a person, he would not be liable for the aggravation of trespass defined in section 459 If, however, he entered lawfully but remained on unlawfully and before departure from the house caused hurt, he would then be liable under section 459 An unsatisfactory consequence of this reasoning would follow The man who committed house-trespass by breaking into a house and before leaving caused grievous hurt would not be guilty of the aggravated form of the offence specified in section 459, while the man who committed criminal trespass by remaining on unlawfully in the house, after having entered therein lawfully, would, if he caused grievous hurt before leaving the premises, be guilty of this special offence. The result would appear absurd. I think that this absurdity can be avoided by adopting either of the two following views One is that section 459 will never apply to a case where the basic offence of criminal trespass is that form of criminal trespass which results from remaining on in the house and will only apply to that form which results from entry into a house. The alternative view, which in practice has the same effect, is that the offence of remaining on is not to be deemed to continue until the premises are vacated but should be held to be complete as soon as the offender has indicated an intention by remaining on to intimidate, insult or annoy the occupant or to commit an offence

Criminal statutes have to be construed strictly in favour of the accused and, whatever view may be adopted to meet the difficulty mentioned, I consider that there is sufficient doubt arising from the language of the Code to prevent it being held that a person who

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has completed a forcible entry into a house should be deemed, by reason of violence subsequently used, to have used violence while house-breaking For this reason I hold that the Magistrate was justified in refusing to commit the accused on a charge under section 459.

The Magistrate, then, had jurisdiction to try the case himself, without committing to Sessions. Nor, in my opinion, was it so undesirable for him to do so as to call for interference in revision. I dismiss both these applications and direct that the records be returned and the trial proceed

Applications dismissed

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Sulaiman

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April, 19.

HAR LAL SINGH AND ANOTHER (PLAINTIFFS) *v* RUDRA SINGH AND OTHERS (DEFENDANTS) *

Civil Procedure Code, order XXXII—Guardian ad litem—*Appointment of guardian after expiry of period of limitation—Pre-emption*—Wajib-ul-arz—*Interpretation—Custom or contract*

Under order XXXII of the Code of Civil Procedure it is the duty of the court, when it is brought to its notice that one of the defendants is a minor, to appoint a guardian, and the mere fact that the guardian may not be appointed until after the expiry of the period of limitation, would not be fatal to the suit *Rup Chand* v *Dasodha* (1), followed

The material portion of a *wajib-ul-arz* dealing with the subject of pre-emption ran as follows —

" In future, every co-sharer has a right to transfer the whole or a portion of his property Up till now no pre-emption suit was instituted on behalf of any co-sharer . In future if any co-sharer likes to sell his property, he will at first sell it to his co-sharers. " etc , etc , *Held*, that there was nothing in the language of the paragraph which militated

* First Appeal No 138 of 1924, from a decree of Preo Nath Ghosh, Subordinate Judge of Bareilly, dated the 22nd of December, 1923

(1) (1907) I L R 30 All , 55

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against the existence of a custom and, therefore, plaintiff's suit must succeed.

Digambar Singh v. *Ahmad Sayed Khan* (1) and *Sheobaran Singh* v. *Kulsum-un-nissa* (2), followed

THIS was an appeal by the plaintiffs arising out of a suit for pre-emption of property sold to three vendees under a sale-deed, dated the 23rd of January, 1922. On the 12th of January, 1923, the present suit for pre-emption was instituted, in which all the three vendees were impleaded. Later on it was discovered that one of the vendees was a minor and on an application made by the plaintiffs a guardian *ad litem* was duly appointed by the court. This appointment, however, was after the expiry of one year from the date of the registration of the document. The plaintiffs relied on the *wajib-ul-arz* of 1870 and alleged that it recorded a custom of pre-emption. They also disputed the genuineness of the amount of consideration mentioned in the sale-deed The defendants, on the other hand, pleaded that the claim as against one, and, therefore, as against all, was barred by limitation, and also that there was no custom of pre-emption in the village They further pleaded that the consideration set forth in the sale-deed was true.

The learned Subordinate Judge, in a very short judgement, disposed of only two issues, leaving the others undecided He held that, inasmuch as the guardian *ad litem* of one of the defendants was appointed after the expiry of the period of limitation, the claim was barred by time as against him. He also held that having regard to the language of the *wajib-ul-arz* no custom was established, and accordingly dismissed the suit The plaintiffs appealed.

Munshi *Sarkar Bahadur Johari*, for the appellants

(1) (1914) I L R, 37 All, 129 (2) (1927) I L R, 49 All, 367

Munshi *Binod Bihari Lal*, for the respondents

The judgement of the Court (LINDSAY and SULAIMAN, JJ.), after stating the facts as above, thus continued :—

We are unable to agree with either of the views expressed by the court below It is difficult to see how the claim can be barred by limitation The real parties to the suit were the vendees themselves and all of them were impleaded within the time allowed. The mere fact that the guardian of one of the vendees was not appointed by the court till after the expiry of the period would in no case be fatal. Under order XXXII it is the duty of the court, when it is brought to its notice that one of the defendants is a minor, to appoint a guardian, and as has been held in the case of *Rup Chand* v *Dasodha* (1), the subsequent appointment of a guardian is not fatal as a plea of limitation As regards the question of custom the only evidence in support of it is the *wajib-ul-arz* of the year 1870 This settlement expired about the year 1900, when the new *wajib-ul-arz*, under the circular of the Board of Revenue, could not contain an entry either way The heading of paragraph 8 which embodies a right of pre-emption is as follows :—

" Relating to transfer of property by means of mortgage, sale, gift, inheritance and custom of pre-emption "

The opening portion of the paragraph which deals with the question of custom is as follows —

" That, in future, every co-sharer has a right to transfer the whole or a portion of his property Up till now no pre-emption suit was instituted on behalf of any co-sharer and decided In future if any co-sharer likes to sell his property, he will at first sell it to his co-sharers and subsequently to the co-sharers in the village, and if they also refuse to purchase it, he may sell it to any one he likes If there shall

(1) (1907) I L R, 30 All, 55

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be any dispute between the vendor and the vendee regarding the difference in price, the co-sharer shall have to pay the same price which a stranger would be willing to pay."

The rest of the paragraph deals with customs of adoption and inheritance with which we are not directly concerned. The concluding portion of that paragraph indicates that the proprietors of the resumed land, who are Muhammadans, are governed, as regards inheritance, by the Muhammadan law. In our opinion there is nothing in the language of this clause which would rebut the *primâ facie* presumption that it is a record of a custom. The statement that no suit for pre-emption had been instituted so far is a mere statement of fact which is not conclusive either way. Similarly, the use of the words "in future" in no way indicates that it was for the first time that the co-sharers were expressing the desire that a right of pre-emption should exist. This expression found place in the *wajib-ul-arz* before their Lordships of the Privy Council in the case of *Digambar Singh* v *Ahmad Sayed Khan* (1) and in spite of its occurrence their Lordships were inclined to hold that there was nothing in the clause which militated against the existence of a custom The opening portion of this clause is similar to the opening portion of the clause in the *wajib-ul-arz* in F. A. F. O. No 17 of 1925, decided on the 25th of June, 1925, by a Bench of this Court, of which one of us was a member. The Bench was inclined to hold that it was a record of custom This view is now strengthened by the recent pronouncement of their Lordships of the Privy Council in the case of *Sheobaran Singh* v. *Kulsum-un-nissa* (2) We are, therefore, of opinion that the presumption arising from the entry in the *wajib-ul-arz* has not been rebutted, and there is no reason to suppose that

(1) (1914) I L R, 37 All, 129 (2) (1927) I L R, 49 All, 367

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the Settlement Officer in making the entry under the heading, "custom of pre-emption," did not intend to record it as such.

As remarked above, the other issues have been left undisposed of by the Subordinate Judge.

[The judgement then dealt with the evidence and concluded as follows :—]

The result, therefore, is that we allow the plaintiffs' appeal, and setting aside the decree of the court below decree the plaintiffs' claim for pre-emption

Appeal allowed.

Before Mr Justice Sulaiman and Mr Justice Banerji

NIRBAN SINGH (PLAINTIFF) *v* BARI BITTA AND ANOTHER (DEFENDANTS) * 1927 *April*, 19.

Act (Local) No. III of 1901 *(United Provinces Land Revenue Act), section 111—Partition—Question of title—Compromise of doubtful rights—Writing—Registration*

The jurisdiction of the civil court to inquire into a claim of title as regards properties which are the subject-matter of a partition in the revenue court arises only under section 111 of the Land Revenue Act When no suit has been instituted within the time allowed by that section and in compliance with it, the civil court cannot go on with the inquiry

Under section 111 of the Land Revenue Act, the partition court has power either to decide the question of title itself or direct any party in the case to institute a suit within three months in the civil court for the determination of the question raised If the party ordered to file a suit within three months fails to do so, under sub-clause (2) of that section the Collector must decide the question against him, and if the suit is instituted, the partition court acts in accordance with the decision of the civil court

Under no law is a compromise or a mutual settlement between parties required to be reduced into writing, and when

* First Appeal No 237 of 1924, from a decree of Ganga Prasad, Subordinate Judge of Pilibhit, dated the 13th of March, 1924

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no writing is absolutely necessary, registration is not compulsory.

THIS was a plaintiff's appeal arising out of a suit for a declaration that the plaintiff was, by right of survivorship and according to a mutual settlement, the exclusive and absolute owner in possession of certain zamindari properties consisting of six items set forth in the plaint, and that the principal defendant, Musammat Bari Bitta, had no right of ownership or partition thereto, except to get Rs. 500 a year as maintenance allowance The case put forward in the plaint was that the plaintiff was a member of a joint Hindu family with the principal defendant's deceased husband, Gobardhan Singh, and that when he died Musammat Bari Bitta did not succeed to his estate as a Hindu widow. It was mentioned that she applied to the revenue court for partition of some villages and the plaintiff objected, with the result that the revenue court referred the plaintiff to the civil court for a declaration of his ownership The plaintiff, however, alleged that, before he could file a suit, there was a mutual compromise under which it was settled that the defendant would give up all claim to the villages in dispute in the revenue court, as well as other properties which were the subject of dispute in the civil suit, and receive Rs 500 as maintenance allowance The contesting defendant pleaded that her husband was separate from the plaintiff and that she had succeeded to his estate as a Hindu widow She denied that any complete compromise was arrived at between the parties which determined their proprietary title It was also pleaded that the claim was barred under sections 111 and 233 (*k*) of the Land Revenue Act The Subordinate Judge did not allow the plaintiff an opportunity to produce oral evidence to prove the alleged compromise His opinion was that

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such a compromise had to be reduced into writing and duly registered, and without such formality it was not enforceable in law. He accordingly excluded all evidence offered by the plaintiff to prove the terms of the compromise. Nevertheless, for purposes of limitation, he recorded a finding that on the evidence he was inclined to hold that there was a compromise from which the defendant subsequently backed out. In his opinion the claim was not barred by limitation, inasmuch as there was something tantamount to a fraud practised by the defendant The plaintiff's suit failed merely on the ground that there was no registered document The plaintiff appealed to the High Court

Mr *B E. O'Conor*, Sir *Tej Bahadur Sapru* and Mr *P N Sapru*, for the appellant

Babu *Piari Lal Banerji*, for the respondents

The judgement of the Court (SULAIMAN and BANERJI, JJ.), after stating the facts as above, thus continued :—

We are unable to agree with the court below on either of the two main points decided by it

The question really was not strictly one of limitation coming under the Limitation Act Even if it were, section 18 of the Limitation Act would hardly be applicable, as that can apply only when the plaintiff has by the fraud of the opposite party been kept from the *knowledge* of his right or title That obviously was not the case here The question, however, is not one of limitation in the strict sense of the word Under section 111 of the Land Revenue Act, the partition court has power either to decide the question of title itself or direct any party in the case to institute a suit within three months in the civil court for the determination of the question raised. If the party ordered to file a suit within three months fails

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to do so, under sub-clause (2) of that section the Collector must decide the question against him If the suit is instituted, the partition court acts in accordance with the decision of the civil court. It is an admitted fact that the present civil suit was not filed within three months of the order passed by the partition court On this fact being brought to the notice of the revenue court on the 30th of April, 1923, it held that the objector had failed to file a civil suit and that the partition proceedings should accordingly proceed. That, no doubt, was a decision against him on the question raised by him. When the objector went up in appeal the appellate court came to the same conclusion and held that, no civil suit having been filed within the three months allowed, the procedure of the revenue court in proceeding with the partition was correct The appeal was accordingly rejected. In our opinion the jurisdiction of the civil court to inquire into a claim of title as regards properties which are the subject-matter of a partition in the revenue court, arises only under section 111 When no suit within the time allowed by that section and in compliance with it has been instituted, the civil court cannot go on with the inquiry. If such a thing were allowed the result may be that the revenue court may ignore the civil court's decree which would be altogether ineffectual and futile Under these circumstances, it is obvious that section 111 is a bar to the plaintiff's claim as regards the villages which were sought to be partitioned or to which the order referring the objector to the civil court expressly or by necessary implication applied.

Assuming that there was a complete compromise between the parties subsequent to the order of reference to the civil court and the institution of the civil suit, such a compromise could be brought to the notice

of the revenue court itself. Under sub-clause (3) of section 111 that court could have taken into account such a compromise and decided the suit in accordance with it. As a matter of fact, the matter was brought to the notice of the appellate court, which came to the conclusion that the compromise did not relate to the question of title but merely to a settlement of the question of attachment Having regard to these circumstances, we are of opinion that the present suit, so far as it relates to the properties in dispute in the revenue court, cannot be entertained.

It may follow, further, that the decision of the partition court on the question whether the family was joint or separate must now operate as *res judicata* and that it is no longer open to the plaintiff to contend that the family was joint in respect of the properties in dispute in the revenue court. Such a position would be untenable It is in view of these circumstances that the learned advocate for the appellant has not pressed grounds Nos 1, 2 and 7 of the memorandum of appeal .

We, however, do not think that the court below was right in rejecting the oral evidence tendered by the plaintiff Under no law is a compromise or a mutual settlement between parties required to be reduced into writing When no writing is absolutely necessary, it is difficult to see how registration would be compulsory. A compromise of this kind does not necessarily amount to a transfer of property It is more an acknowledgement of the right of a claimant than an actual transfer to him We, therefore, think that the court below was not right in excluding oral evidence that was offered by the plaintiff to prove the terms of the alleged compromise It is only after the whole evidence has come on the record that it can be decided

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whether the alleged compromise had passed the stage of a mere negotiation and whether it had been completed It is also only then that it can be decided whether it was a necessary part of the compromise that it should be reduced to writing and filed in any court. The defendants in their written statement have admitted that a suit for the partition of Minterpur. Katia and Naugawan, had been instituted in the revenue court

We accordingly send down the following three issues to the court below :—

(1) Whether there was any complete compromise between the parties as set out in paragraph 11 of the plaint and, if so, what were its actual terms and to what properties it related.

(2) Was it an essential part of this compromise that it should be reduced into writing or that it should be filed in any court of law?

(3) Were any of the villages, Khardhai, Deoria Kalan and Deohanan, in dispute in the partition court?

The parties will be entitled to produce further oral and documentary evidence on the issues remitted The court below will return the findings, after taking the necessary evidence, by the 15th of July, if convenient.

Issues remitted.

REVISIONAL CRIMINAL

Before Mr. Justice Iqbal Ahmad.

EMPEROR *v.* AJAM *

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April, 20.

Criminal Procedure Code, section 437—Discharge—Further inquiry—Circumstances in which the power to order further inquiry should not be exercised.

Sessions Judges and Magistrates should, in a case where a man has been discharged, use the powers given to them by section 437 of the Criminal Procedure Code sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact. Where the order of discharge is one which cannot be said to be either perverse or *primâ facie* incorrect and there is no suggestion that any further evidence is forthcoming, no further inquiry should be directed under section 437 of the Code.

Queen-Empress v. *Chotu* (1), and *Bindesri Dube* v. *Emperor* (2), followed.

THESE were two applications in criminal revision. The facts are fully set forth in the judgement of the Court.

Munshi *Shambhu Nath Seth*, for the applicant.

Dr. *N. C. Vaish*, for the opposite party.

IQBAL AHMAD, J.:—Criminal Revisions Nos. 127 and 182 of 1927 are connected with Criminal Revisions Nos. 179 and 206 of 1927 that have been disposed of by me today.

The applications in Revisions Nos. 127 and 182 of 1927 are directed against an order of the learned Sessions Judge, by which he has set aside the order of discharge passed by a Magistrate of competent jurisdiction, and has ordered further inquiry into the case in which the applicants before me were charged with

* Criminal Revision No. 127 of 1927, from an order of Abdul H[illegible], Additional Sessions Judge of Cawnpore, dated the 23rd of December, 1926.

(1) (1886) I.L.R., 9 All., 52. (2) (1920) 18 A.L.J., 1135.

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offences punishable under sections 147 and 325 of the Indian Penal Code

It appears that the relations between the tenants of village Gauhani and Thakur Bishwanath Singh, zamindar of that village, have been strained for a number of years, with the result that there have been cases between them in the civil and the revenue courts. On the 13th of January, 1926, a riot took place in village Gauhani and a report of the incident was made in the police station of Majhgawan by some of the tenants and another report was made by the zamindar's men at Rath police station.

It was stated in the report made by the tenants that the fight originated in an attempt made by the zamindar's men to cut a *mahua* tree belonging to them and the resistance offered by them. They alleged that three tenants named Dhanwan, Rajaiyan and Parichhat went to the spot on being informed that the zamindar and his servants were cutting a *mahua* tree standing in or about their field, and when the above named tenants asked the son of the zamindar, who was present on the spot, not to get the tree cut, they were at the instance of the zamindar's son beaten by his men

The case set up on behalf of the zamindar was that a party consisting of zamindar's servants was taking a sum of Rs 1,000 from Rath to Malchta, where the zamindar resides, and that the party was waylaid by a number of tenants who were named in the report lodged at the Rath police station, and was attacked by them and robbed of the entire money. The case was investigated by an Inspector of Police who eventually sent up the applicants before me to stand their trial under sections 147 and 325 of the Indian Penal Code

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Some of the tenants filed a complaint against the zamindar's men under the same sections, while another complaint was filed by Gajadhar Prasad, one of the servants of the zamindar, against the applicants and certain other tenants of Gauhani. That complaint was with respect to offences under sections 147, 326, 395, 397 and 149 of the Indian Penal Code.

The learned Magistrate, after a protracted trial, came to the conclusion that some of the men of the zamindar's party were guilty under sections 147 and 324 of the Indian Penal Code and accordingly convicted them. The conviction of some of them was upheld by the learned Sessions Judge but their conviction has been set aside by me today. The learned Magistrate also held that the case of dacoity set up by the zamindar was positively false. He gave convincing reasons for holding that all the evidence for the prosecution was tainted, and that implicit reliance could not be placed on the testimony of even one individual witness for the prosecution examined on behalf of the zamindar. Disbelieving the entire evidence for the prosecution against the tenants, he discharged all of them and observed in the course of his judgement that "it is true that a case of serious rioting goes unpunished, though committed in broad daylight and witnessed by a number of persons. The blame for it goes to the prosecution—both to police prosecution and to the complainant prosecution." In my judgement the learned Magistrate adopted the right course in discharging the applicants. If the prosecution did not choose to put the correct version of facts before the court and itself attempted to spoil a true case by adducing false and perjured evidence, the learned Magistrate could not but discharge the accused.

On an application for revision against the order of discharge being filed by the zamindar's karinda,

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the learned Sessions Judge has affirmed the finding of the learned Magistrate that the statement of the prosecution witnesses that a dacoity was committed was not true But he was of opinion that inasmuch as the injuries received by the zamindar's men were considerable in number, the number of the tenants must have exceeded that of the men on the zamindar's side, and that the learned Magistrate was not justified in discharging the applicants before me on the mere ground that a false case of dacoity had been set up on behalf of the zamindar.

The learned Sessions Judge in the connected case has held that the question whether the *mahua* tree belonged to the zamindar or to the tenants was not free from difficulty, and that, though a free *lathi* fight took place between the zamindar's men and some of the tenants, it was difficult to find out as to which party was the aggressor. These being the findings of the learned Sessions Judge, I cannot uphold his order setting aside the order of discharge passed by the learned Magistrate, and directing a further inquiry into the case

The learned Magistrate has pointed out in his judgement the exaggerations in the prosecution case. He has emphasized the fact that from time to time the zamindar's karinda was at pains to implicate persons not named in the first report When the entire evidence for the prosecution is unworthy of belief no useful purpose will be served by trying the applicants again for the very offences for which they have already been tried and discharged.

It has been pointed out in a Full Bench case of this Court, namely, *Queen-Empress* v *Chotu* (1), that Sessions Judges and Magistrates should, in a case

(1) (1886) I L R, 9 All 52

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where a man has been discharged, use the powers given to them by section 437 of the Code of Criminal Procedure sparingly and with great caution and circumspection, specially in cases where the questions involved are mere matters of fact. To the same effect is the decision in *Bindesri Dube* v. *Emperor* (1). It has been held in that case that "where an accused person has been discharged, if the circumstances and the evidence are such that two different courts might take two different views of the evidence, and the order of discharge is one which cannot be said to be either perverse or *primâ facie* incorrect and there is no suggestion that any further evidence is forthcoming, no further inquiry should be directed under section 437 of the Code of Criminal Procedure."

In the present case there is no suggestion that any fresh evidence will be forthcoming if a fresh inquiry is held by a Magistrate, nor can it be said that the judgement of the learned Magistrate is perverse or *primâ facie* incorrect.

Applying the test laid down in the cases cited above, I am unable to hold that the learned Sessions Judge was right in setting aside the order of discharge and ordering further inquiry into the case.

Accordingly I allow this application, set aside the order of the learned Sessions Judge and restore the order of discharge passed by the learned Magistrate.

Application allowed.

(1) (1920) 18 A. L. J. [illegible]

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Dalal

1927 April, 20.

MULCHAND RAM PRASAD (PLAINTIFF) *v* THE GREAT INDIAN PENINSULA RAILWAY (DEFENDANT).*

Act No IX of 1890 *(Indian Railways Act), section* 72—*Railway—Goods in transit destroyed by fire—Extent of liability of railway administration—Act No. IX of* 1872 *(Indian Contract Act), sections* 151 *and* 152.

The liability of a railway company in respect of goods carried by it "at railway risk" is governed by sections 151 and 152 of the Indian Contract Act, 1872. Where such a consignment was destroyed by fire, it was *held* that the railway company had discharged its liability when it had shown that it had done everything that a reasonable and prudent man would have done to protect and endeavour to save his own property. It was not bound to explain and prove the actual origin of the fire and to show that the company was free from any negligence in the matter.

THE facts of the case are fully stated in the judgement of the Court.

Pandit *Gopinath Kunzru*, for the appellant.

Pandit *Ladli Prasad Zutshi*, for the respondent.

MEARS, C. J., and DALAL, J.:—This is the appeal of a firm, Mulchand Ram Prasad, from a decision of the District Judge of Cawnpore who, affirming the decision of the Subordinate Judge, rejected the appeal of the plaintiff. The plaintiff firm had consigned 41 bags of betel-nuts from a place Bhola to Banda. That was on the 7th of May, 1923. One bag went astray, and for that the lower court gave compensation. That matter is final as between the parties. The remaining 40 were destroyed by fire. On the 7th of June, 1923, the wagon with the 40 bags was at

* Second Appeal No. 224 of 1925, from a decree of H. E. Holme, District Judge of Cawnpore, dated the 23rd of October, 1924, modifying a decree of Gauri Shankar Tewari, Subordinate Judge of Banda, dated the 17th of March, 1924.

Manikpur station The wagon was examined and was despatched to Karwi, arriving there on the next day, the 8th June. At Karwi certain packages were taken out of the wagon and ten bags of rice and five bundles of gunny bags were put into the wagon which left at 12.30 at night on the 9th *en route* to Banda. The train ran through one station and stopped at Bharat Kup, and there a pointsman noticed the fire in wagon No. 25045 and gave the alarm This was the wagon in which the plaintiff's goods were contained The engine-driver, the guard, the Assistant Station Master and other persons came up. The wagon was taken to a siding, efforts were made by means of a hook to drag out packages, but this could not be done. Efforts were made to put out the fire with water. This proved unavailing The fire was, according to the evidence, very fierce, and consumed the betel-nuts, gunny bags, rice and the covered van itself. Under these circumstances the plaintiff commenced a suit for the recovery of Rs 2,065 damages. Mr Gauri Shankar Tewari who tried the case drafted, in our opinion, the proper issues and in every way appreciated what the point was that had to be decided It may be stated that the railway company alleged that they were protected by a risk-note form H, but on investigation it was found that no such note had been signed by the consignor, and that, therefore, as between the consignor and the railway company they were governed by the ordinary law applicable to goods carried at railway risk. The railway company traced the whole history of the consignment, from the moment when undoubtedly it was safe and secure at Manikpur to the time when it had been totally destroyed at Bharat Kup, and they showed to the satisfaction of the Subordinate Judge that they had taken the same care of the consignor's goods as

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a prudent and reasonable man would have done of his own; that is to say, they had placed the goods in a wagon reasonably fit for the purpose with a fire proof iron roofing, that they had been careful not to put any inflammatory goods with the consignment, that the wagon had been examined internally and externally at proper times, and that when at Bharat Kup the fire was found all acts were done which a reasonable and prudent man would have done to protect and endeavour to save his own property. The learned Subordinate Judge, having heard all the evidence, found that the defendants had acted up to that standard, and that being so, held that they were absolved from any liability to make good to the plaintiff the loss or damage sustained by him. We are in complete agreement with the Subordinate Judge and the District Judge in this case, and we consider that the decision arrived at is a right one. It has been suggested to us that in all these cases the railway company cannot escape liability unless it can explain and prove the actual origin of the fire and show that the railway company itself was free from any negligence in the matter. We do not think that the liability of a railway company is as high as that. It is governed by sections 151 and 152 of the Contract Act, and both courts had this legal position carefully in mind and decided this case in accordance with law.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Dalal

RAM PRASAD (DECREE-HOLDER) *v.* GORE LAL AND ANOTHER (JUDGEMENT-DEBTORS) * 1927 April, 20

Act (Local) No II of 1903 (*Bundelkhand Land Alienation Act*) *section* 3—"*Brahmans*"—"*Brahma Bhats*"—*Execution of decree—Objection raised after record sent to Collector to carry out sale.*

Held, (1) that "Brahma Bhats" are "Brahmans" within the purview of the Bundelkhand Land Alienation Act, 1903, and (2) that an objection that property is not, under the terms of the Act, saleable in execution of a decree, can be taken at any time up to the actual sale.

THIS was a second appeal arising out of proceedings in execution of a decree, the material question at issue being whether the property was not exempt from sale under the provisions of the Bundelkhand Land Alienation Act, 1903. The facts of the case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgement of the Court.

Dr. *Surendra Nath Sen* and MR *B. Malik*, for the appellant.

Pandit *Rama Kant Malaviya*, for the respondents

MEARS, C J, and DALAL, J —Both subordinate courts have held that the respondents are Brahma Bhats and included in the term "Brahmans," who are privileged persons, and whose agricultural land cannot be attached or sold in execution of a decree under the provisions of the Bundelkhand Land Alienation Act. It was argued here (1) that Bhats are Brahma Bhats and are not included in the term

* Second Appeal No 227 of 1926, from a decree of E L Norton, District Judge of Jhansi, dated the 28th of October, 1925, confirming a decree of Shamsuddin Khan, Subordinate Judge of Jhansi, dated the 28th of May, 1925

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"Brahman" but are either *banias* or *sudras* and (2) that the objection was raised by the judgement-debtors very late in the proceedings, after attachment was made and the file was sent to the Collector to carry out the sale of the agricultural land.

The finding is one of fact that Brahma Bhats are included in the term "Brahman." The learned Judge of the lower appellate court has given reasons for holding that the intention of the Government was to include Brahma Bhats in the term Brahman. In the Notification issued under the Act all Brahmans are granted this privilege except Marwari Brahmans. The exception of Marwari Brahmans indicates that all other sub-castes of Brahmans are included. A reference was made to the Punjab Census Report, where these people were included under the heading as Brahmans, and also to the usage in the Central Provinces, and the lower court on the basis of that evidence held that Brahma Bhats were Brahmans. This is a finding of fact and binding on us in second appeal.

So long as the property is not sold the judgement-debtors are entitled to claim the privilege to which they are entitled under the Act. They are in no way estopped, because we were not told how the decree-holder suffered by the objection being raised at a late stage of the proceedings.

We dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Justice Sir Cecil Walsh and Mr Justice Boys

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v* BHAGWAN DAS AND ANOTHER (PLAINTIFFS) AND B N W. RAILWAY COMPANY (DEFENDANT) * 1927 *April*, 20.

Act No IX of 1890 (*Indian Railways Act*), *section* 72(2)(b)—*Railway company—Liability of company for goods stolen out of a bale whilst in the custody of the company's servants—Construction of document—Risk-note in form "H."*

Held, on a construction of the new form of risk-note "H", that the note would not afford any protection to the railway company in a case where a bale or package, having been received into the custody of the company's servants properly packed and in good condition, with no sign of having been tampered with, was afterwards found, whilst still in the same custody, to have been opened and sewn up again and part of the contents abstracted Either, and most probably, the theft had been committed by some of the railway servants themselves, or the railway servants in charge of the goods had allowed some trespasser to have access to them, in which case equally the company would be liable *Secretary of State for India in Council* v *U. P Glass Works* (1), not followed

THIS was an application under section 25 of the Small Cause Courts Act, 1887, against a decree of the Judge of the Court of Small Causes at Deoria, decreeing the plaintiff's claim against the Secretary of State as representing the Great Indian Peninsula Railway Company in respect of certain goods which had been stolen whilst in the custody of the railway The case came in the first instance before LINDSAY, J., who, being disposed to doubt the correctness of the ruling relied on by the applicant, viz , *Secretary of State for India in Council* v *U. P Glass Works* (1), referred it to a Bench of two Judges

* Civil Revision No 186 of 1926

(1) (1926) I L R , 48 All , 584

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Dr. *Surendra Nath Sen* and Mr. *B. Malik*, for the applicant

Pandit *Ambika Prasad Pandey* and Munshi *Rudra Narain Srivastava*, for the opposite parties

WALSH, J —This case has been argued in revision, or rather under section 25 of the Small Cause Courts Act, and having regard to a decision of Mr. Justice DANIELS, reported in *Secretary of State for India in Council* v. *U. P. Glass Works* (1), and relied upon to some extent by the railway, Mr. Justice LINDSAY has referred the matter to two Judges, apparently feeling that unless he differed from the decision he ought to allow the revision, but that, on the other hand, he was not prepared to follow the decision.

Under the circumstances we do not think it necessary to discuss in detail the decision of Mr. Justice DANIELS beyond holding that it does not, in our opinion, apply to the facts of the case before us, and that if the true interpretation of it is that in the case before us the railway company would be exempt from liability unless the consignor proved actual misconduct, we should be unable to agree with it, leaving it to other tribunals in other cases which may arise to decide how far our decision is actually inconsistent with what Mr Justice DANIELS decided. In this case the matter seems to us to be perfectly clear. The facts have been found in a very clear and ably stated passage in the judgement of the Small Cause Court Judge. We may summarize his findings in this way There was one package or bale. It contained dhotis. When it was received at the station of despatch it was weighed in by the weighing clerk,

(1) (1926) I L R, 48 All, 584

and its weight was correct, and was entered on the forwarding note as being 4 maunds and 25 seers. There was no suggestion that the scales were out of order. The bale, when received into the custody of the railway servants at the station of despatch and weighed, appeared to be in a normal condition, that is to say, it appeared to have been properly packed and showed no signs of slackness in the sewing up or of interference It then passed into the custody of the servants of the railway company for storage in the godown or warehouse or other place where such goods are kept awaiting transport When the wagon for transport was ready the bale, which had not left the custody of the railway company's servants, was then placed in a wagon and the wagon was sealed for transit. On arriving at the destination it was found that, although the seal of the wagon was intact, the bale was quite the reverse. It had been opened, it had been re-stitched, it was short in weight, and there were eleven pairs of dhotis missing from it The seal of the wagon appeared not to have been tampered with, and, therefore, unless some mischievous and dishonest servant had discovered some method of removing the seal and replacing it without leaving any indication of such an operation, it must be assumed that the pilfering, which undoubtedly took place, took place before the wagon was sealed. A faint suggestion seems to have been made by the railway company that the shortage in weight was due to evaporation of moisture. The learned Judge evidently experienced great difficulty in treating this suggestion seriously, and we are not surprised, because, whatever evaporation of moisture there may have been, and it is surprising to hear that dhotis can be sold in such a condition, it would be necessary to infer that the eleven pairs of dhotis had

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Walsh, J.

leaked out of the hole or re-stitching and somehow escaped from the parcel—a perfectly ridiculous suggestion. The result, therefore, is that on the evidence called by the company,—because the whole of the facts which we have just summarized constitute the history of the company's dealings with the parcel from the moment when it was received into their custody,—it follows that the leakage or pilfering must have taken place after the goods were weighed, while they were in the custody of the company and before the wagon was sealed. The material provision which relieves the consignor from the burden of proving misconduct is the following sentence:—"If misconduct on the part of the railway servants can be fairly inferred from such evidence." The learned Judge has inferred that the pilferage took place after the goods were received by the booking clerk, and, therefore, as a result of misconduct by the railway servants. We agree, and we hold, as no doubt he held, that it is the only possible inference to be drawn, because even if the railway servants did not themselves commit the pilfering and share the loot, which they probably did, it would have been impossible for anybody to have obtained access to the package in such a way as to extract eleven pairs of dhotis and to sew the package up again without a breach of duty on the part of the railway company's servants which would amount to misconduct, because even if it might not be criminal, though in most cases it would be, a railway servant who is placed as a kind of guardian over the goods of the public in transit is undoubtedly guilty of misconduct if he allows a trespasser to obtain access to such goods. In our view the risk-note creates no difficulty. Where the inference, which the learned Judge in this case has drawn, may legitimately be drawn, it is not necessary to call

upon the consignor to give evidence of misconduct Therefore it was unnecessary in this case. We think the inference was legitimate and there is no ground for interference with the decision The head-note of Mr Justice DANIELS' judgement undoubtedly purports to deal with clause (*b*). This case before us arises under clause (*b*). To take the view that the railway is protected from liability where it is only a part of a consignment, not consisting of one complete package, which has been lost, seems to us to do violence to the expression "pilferage from a package" and to be inconsistent therewith. Pilferage from a package must in nearly every case be of a part of that package, however many packages there are in the consignment, and, therefore, we can only say that if the learned Judge intended his ruling to apply to that provision in clause (*b*), we are unable to agree with it

This revision must be dismissed with costs

BOYS, J.:—This revision raises a question of the interpretation of risk-note form H, one of the new forms provided for the despatch of goods by railway. It is to be found on page 651 of Part I of the *Gazette of India* of the 12th of July, 1924. I need not repeat the facts They amount to this that out of eleven bales of cloth goods it was found on arrival that one of the bales had been tampered with and eleven pairs of dhotis were missing The suit is to recover from the railway company the value of these dhotis It may be taken as found in fact that the evidence in the case proves up to the hilt that the disappearance of the eleven pairs of dhotis was due to the "misconduct of the railway servants" The trial court held the railway company liable

The defendant came to this Court in revision on three grounds, of which the only one that we have to

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Boys, J

consider is: "Because the consignment having been made under risk-note form H (new) the petitioner railway company is absolved from all liability to the plaintiff for non-delivery *of a part of the consignment not consisting of one or more complete packages*"

The risk-note set out that the consignor agreed to hold the railway administration "free from all responsibility for any loss, destruction or deterioration of, or damage to, all or any of such consignments from any cause whatever, except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants." This is the only portion of the note which declares the liability or otherwise of the railway. It is followed by a proviso divided into two parts, but that proviso merely provides in two cases rules as to the production of evidence and as to how misconduct is to be proved and when it may be inferred. It is clear that primarily the burden of proof is on the claimant to establish misconduct. Recognizing, however, that a private consignor cannot ordinarily be fairly expected to be able, by any means in his own power, to lay before the court the history of the dealings with the consignment between the time he handed it over and the time the consignee took delivery, it has been provided that in two cases (*a*) and (*b*) the railway administration shall be bound to disclose their dealings with the package in transit and to give evidence thereof, before the consignor is called upon to prove misconduct. If, when such evidence has been given, an inference of misconduct on the part of the railway company can fairly be drawn from that evidence, the claimant has proved his case of misconduct and need do nothing further. If such an inference cannot fairly be drawn, then he has to discharge the burden of proving the

misconduct. This obligation is thrown on the railway company only in the two cases coming within the clauses (*a*) and (*b*) of the proviso. With what cases there may be not coming within those two clauses we are not here concerned, but alleged deterioration suggests itself as one such case. It has so far been necessary to refer to the proviso only in order to make it clear that the proviso does not deal with the primary issues in the case but only with the method of proof of such issues.

The primary issues in this case were two :—

(1) Did the disappearance in transit of eleven pairs of dhotis constitute " loss, destruction or deterioration of, or damage to, all or any of such consignments ?"

(2) If it did constitute " such loss, etc " did " such loss, etc " arise from the misconduct of the railway administration's servants ?

The second question has been answered in favour of the plaintiff and in this case at any rate the answer amounts to a definite finding of fact

As to the first issue it is contended in the ground of revision which we have set out that " non-delivery *of a part of a consignment not consisting of one or more complete packages* " does not come within the terms " the loss, etc " It is contended that to bring the case within those terms there must have been loss of a whole consignment or of the whole of one or more packages forming part of a consignment. I am not concerned to consider decisions on the old form. It was notoriously a most unsatisfactory form, and it has, in my view, been wholly recast It is obvious that many of the expressions that occurred in the older form must of necessity find a place in the new But

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it is very far from being a necessary corollary that all decisions on the scope of particular words in the old form still hold good to assist us in interpreting the same words in the new form when the form has been wholly recast. I confine myself, therefore, to an interpretation of this form. We have been pressed with the decision of Mr. Justice DANIELS in *Secretary of State for India in Council* v. *U. P. Glass Works* (1), which is a decision upon the new form, and it is in consequence of that decision that Mr. Justice LINDSAY has referred this matter to a Division Bench. In that case, there was a disappearance in transit of 5 tons out of 15 tons of coal. Mr Justice DANIELS held that the existence of the term "non-delivery" in proviso (*a*) showed that "loss, destruction or deterioration of, or damage to, all or any of such consignments" must be held to include "non-delivery." He held that "loss" must be held to include "non-delivery." In that finding and the reasons therefor I concur He went further and held that the non-delivery must be non-delivery of the whole of a consignment or of one or more complete packages and there was in the case before him only non-delivery of a part of a consignment. He, therefore, dismissed the suit While holding that the fact of the form being drawn up in the shape of a main provision followed by a proviso (*a*), showed that the case in the proviso (*a*) was included in the circumstances set out in the main provision, he did not consider the proviso (*b*) at all I have no materials to say why he did not consider that second clause of the proviso, but possibly his reason was that the pilferage of 5 out of 15 tons of coal, presumably loaded in bulk in a truck, could hardly be described as pilferage from a package. Applying, however, his reasoning to the proviso (*b*) it is clear that "*pilferage from a package*" *must also*

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(1) (1926) I L R, 48 All, 564

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be held to come within the main clause "loss, etc.", or, conversely, the phrase "loss, etc." must include, at any rate in one case (i e, pilferage of part of a consignment) loss of part of a consignment. While, therefore, I am of opinion that Mr. Justice DANIELS was, if he held that the loss of 5 tons of coal, out of 15 tons, could not be held to be pilferage from a package, right in holding that the proviso could not be applied when considering the question of burden of proof [for it is clear that proviso (*a*) did not apply], I am unable to agree with him when he goes further and holds that "loss does not include loss of part of a consignment or package and that the railway company is "protected from liability for loss, including non-delivery, of a part of consignment not consisting of one or more complete packages" In my view, if the case before him could not be held to amount to "pilferage from a package" the proviso as to the burden of proof had no application, as it certainly did not come within clause (*a*) of the proviso. But, unless it can be held that "loss" includes some cases of "loss of part" and not others, which there seems no ground for suggesting, the railway was liable for the "loss" of a portion of the consignment, if the plaintiff could be held to have succeeded in proving misconduct (and in proof of that he was entitled to rely upon any evidence that was actually produced by himself or by the railway), even if the railway had produced proof which in law they were not obliged by the proviso to produce I hold, therefore, that loss of a portion of a consignment or of a package does come within the main provision of the form. In this case it is further clear that the circumstances came within clause (*b*) of the proviso, and the railway were properly called upon to give information and evidence On that evidence it has been found that there was misconduct,

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and these findings are sufficient to dispose of the case in the plaintiff's favour and he was rightly given a decree I would dismiss the application

Application dismissed.

REVISIONAL CRIMINAL

Before Mr Justice Lindsay

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April, 22

EMPEROR *v* RAMESHWAR LAL*

Criminal Procedure Code, sections 476 and 478—Order of Civil Court committing accused to Court of Session—Criminal Procedure Code, section 195 (1) (c)—"Produced"—Civil Procedure Code, order VII, rule 17

Held, (1) that a civil court, after starting proceedings under section 476 of the Code of Criminal Procedure and then acting under section 478 is in no way debarred from committing a person who seems to have committed an offence before it to the Court of Session, by reason of the fact that no appeal lies from such an order, (2) that a document, e g , an account book, is none the less "produced" before a court, within the meaning of section 195(*c*), because it is brought into court for the purpose of verifying an extract therefrom made in the plaint according to the provisions of order VII, rule 17, of the Code of Civil Procedure

THIS was an application in revision against an order of a Munsif passed under section 478 of the Code of Criminal Procedure, committing the applicant to the Court of Session on charges under sections 196, 467 and 471 of the Indian Penal Code. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Sir *Charles Ross Alston*, Mr *A. P. Dube* and Babu *Indu Bhushan Banerji*, for the applicant.

* Criminal Revision No 215 of 1927, from an order of Muhammad Junaid, Munsif of Saidpur, dated the 7th of March, 1927

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EMPEROR v. RAMESHWAR LAL

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

LINDSAY, J :—This is an application in revision directed against an order purporting to be passed under section 478 of the Code of Criminal Procedure by the Munsif of Saidpur in the Ghazipur district.

I need not refer in any detail to the facts It is sufficient to say that the applicant before me, Rai Saheb Rameshwar Lal, was the plaintiff in a civil suit in one of the courts at Ghazipur. After that suit had been disposed of, proceedings were started against Rameshwar Lal under the provisions of section 476 of the Code of Criminal Procedure, it being considered apparently that there were reasons for supposing that Rameshwar Lal, in the course of the civil suit just referred to, had been guilty of the offences punishable under sections 196, 467 and 471 of the Indian Penal Code. It is admitted before me that the Munsif was competent to deal with this case when it started under section 476. After the case had been thus initiated in the Munsif's court a successful application was made to the District Judge to transfer the proceedings to the court of the Subordinate Judge of Ghazipur. An application was made to this Court against the order of the District Judge, with the result that the District Judge's order was reversed and the proceedings were sent back again to the court of the Munsif of Saidpur. After the resumption of the proceedings in the court of the Munsif, so far as I understand, evidence was taken on behalf of the opposite party, and from one order of the Munsif I gather that Rameshwar Lal was invited to produce evidence before the Munsif to rebut the evidence which had been given on the other side. A statement was made to the Munsif by the learned counsel for Rameshwar Lal that he declined

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to put forward any evidence by way of rebuttal of the evidence which had been produced by the opposite party. Thereupon the Munsif proceeded to make an order under section 478 of the Code of Criminal Procedure directing the accused person, Rameshwar Lal, to be committed to the Court of Sessions for trial on the offences mentioned above.

It is now sought before me to attack this order of the Munsif on various grounds. It has been argued, in the first place, that the proceedings having started in the court of the Munsif under section 476 of the Criminal Procedure Code, the Munsif was bound to continue the proceedings under that section and to do everything which that section required him to do. In other words, it is contended that the Munsif, in the circumstances, had no option, if he found there was a *primâ facie* case against Rameshwar Lal, but to send a complaint to a Magistrate. It is argued that having started proceedings under section 476 the Munsif had no authority to proceed under section 478 and make an order of commitment. In my opinion this argument is altogether untenable. In support of the argument it is pointed out that where a court takes action under section 476 and directs a complaint to be laid before a Magistrate there is an appeal against the order directing the complaint to be made. On the other hand, it is argued that if the procedure adopted by the Munsif in this case is allowed and it is competent to him to pass an order under section 478, then the right of appeal, which the person affected would have, had the proceedings been taken under section 476, is taken away.

It is quite plain to me that there is no right of appeal against an order passed under section 478. There can be no right of appeal unless the right is conferred by the Statute, and the only right of appeal

which is to be found in this chapter XXXV is referred to in section 476B That certainly gives a right of appeal against an order passed under section 476. There is no corresponding provision relating to the case of an order under section 478, and I am satisfied that there is no right of appeal. It appears to me to be impossible to argue that because the Munsif as a civil court has the option under section 478 of sending the case to a Magistrate under section 476 or of committing it direct to the Court of Sessions, he is debarred from the exercise of that option because by passing an order under section 478 he deprives the person accused of the offences of a right of appeal It is not for me to speculate why no right of appeal has been given against an order passed under section 478 The fact remains that there is no right of appeal against such an order I hold, therefore, that the order of the court below cannot be attacked on this ground. It is to be mentioned here that two out of the three offences imputed to the accused, namely, the offences punishable under sections 467 and 471 of the Indian Penal Code, are offences triable exclusively in the Court of Sessions.

Another point which has been raised is that in any case the offences now charged do not fall within the description of the offences specified in section 195 (1) (*c*) of the Code of Criminal Procedure This argument is raised with reference to the two charges under sections 467 and 471 of the Indian Penal Code. It is suggested that it cannot be said that those offences were committed in respect of a document "produced or given in evidence in the civil court" In order to understand this plea it is necessary to state that the accused person here, Rameshwar Lal, was the plaintiff in the civil suit He brought his suit on the basis of an entry in a book of account and the

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copy of the entry accompanied the plaint. Under order VII, rule 17, of the Code of Civil Procedure, when a plaintiff is suing upon an entry in a book of accounts, he has to file with his plaint a certified copy of the entry in the book and he has also to produce the book in court in order to have the copy verified either by the court or by an officer whom the court appoints. In this case the account book was produced in court in the usual way. The copy of the entry which was filed with the plaint was compared with the original by the Munsarim and after the Munsarim had checked the copy he marked the account book and returned it to the plaintiff in the ordinary way of procedure The suggestion appears to be that because this book was only produced before the Munsarim for the purpose indicated in order VII, rule 17, there was no production in court. I must decline to entertain any argument of this kind. The account book was most certainly produced in court and, therefore, any offence committed in respect of this account book has certainly been committed in respect of a document produced in court. It may be that the book was never called to the court after it had been shown to the Munsarim. It seems that the case was decided on the oath of the defendant That, however, makes no difference to the situation. The account book was clearly produced in court and, therefore, the offences under sections 467 and 471 are offences of the kind described in section 195(1) (*c*) of the Code of Criminal Procedure These are the only points which arise for decision before me and I decide them both against the applicant

Sir *Charles Ross Alston* informed me that his client desired me to hear something about the facts of the case, but I refused to go into the facts. It seems to me that there is no need for me to consider any facts

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at all The order which is passed by the Munsif and which is attacked here seems to me to be legally unassailable I dismiss this application

Application dismissed

APPELLATE CIVIL.

Before Justice Sir Cecil Walsh, and Mr Justice Ashworth

DEBI DAS (DEFENDANT) v. MAHARAJ RUP CHAND (PLAINTIFF) *

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April, 25

Civil Procedure Code, order XXI, rules 58 to 63—Attachment —Application by alleged mortgagee to have his mortgage notified—Dismissal of application—Suit by mortgagee— —Limitation—Act No IX of 1908 (Indian Limitation Act), schedule I, article 11

A person who claimed to be the holder of a mortgage on some property which was the subject of an attachment, applied to the executing court and asked that his mortgage might be notified The court, largely because the applicant gave it no assistance by supplying the necessary information, found that no mortgage was proved to exist, and dismissed the application

Held, that rule 63 of order XXI of the Code of Civil Procedure applied and it became necessary for the applicant to sue within one year to establish his right as mortgagee *Durga Prasad* v *Mansa Ram* (1) and *Ganesh Krishna* v *Damoo* (2), dissented from *Venkataratnam* v. *Ranganayakamma* (3) and *Lakshmanan Chettiar* v *Parasivan Pillai* (4), referred to.

Held, further (by ASHWORTH, J.), that headings to chapters of groups of sections—unlike marginal notes—can be looked at as a guide to the interpretation of the sections to which they relate

* Second Appeal No 849 of 1925, from a decree of Agbore Nath Mukerji, Additional Subordinate Judge of Bareilly, dated the 22nd of November, 1924, reversing a decree of Lakshmi Narain Misra, Additional Munsif of Bareilly city, dated the 31st of May, 1924

(1) (1904) I A L J , 531 (2) (1916) I L R , 41 Bom , 64
(3) (1918) I L R , 41 Mad , 985 (4) (1919) 37 M L J , 139

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THE facts of this case sufficiently appear from the judgement of WALSH, J.

Babu *Indu Bhushan Banerji*, for the appellant when [illegible] appellant's counts, he has to file with [illegible]

Pandit *Uma Shankar Bajpai*, for the respondents.

WALSH, J. :—In my opinion this appeal must be allowed. I wish to make it clear that I am deciding this case and no other, but I find insuperable difficulty in getting over the terms of the order in this case of the 11th of August, 1917, and the reasoning in the Madras case to which I am about to refer and a subsequent Madras authority which took the same view

We have not the application before us which was made by this mortgagee, but the facts are really not in dispute There was a mortgage. The mortgagee, therefore, had a right and interest in the property attached There had been an attachment and if the attachment was continued and the execution took its ordinary course, there would necessarily be a sale. That is by practice, by common experience, and by ordinary business considerations, the proper time for the mortgagee to draw the attention of the court to the existence of his right or claim. It may well be that he does not object to the attachment *per se*. It may be that he considers that he is adequately secured, but a finding after inquiry in favour of his mortgagee rights with a continuance of the attachment and an order for sale subject to the mortgage very much simplifies his position and his opportunity for enforcing his legal rights, and removes the risk of further litigation, in addition, an application for an order against the mortgagee, where the property is said to be of less value than the mortgage-deed, would probably result in the court holding its hand and refraining from the idle farce of selling what did not exist,

namely, the debtor's pecuniary interest or the market value of the equity of redemption It seems to me, therefore, that the Code contemplated and did its best to provide the most convenient and expeditious way of dealing with the mortgagee rights where mortgaged property has been attached, and the necessary corollary to rule 58 of order XXI, which certainly treats the claim or objection as though it were made to the attachment *in toto*, are rules 62 and 63 which direct what the court shall do when a question is raised as to the existence of the mortgage; and although the mortgagee may not desire to object to the attachment *in toto*, or expect success if he does so, he must in order to raise his claim object to the attachment in some form or another, and what the legislature contemplated no doubt was in rule 62 something of this kind, —the court would say to the mortgagee "There is no real objection so long as your right is protected" and the mortgagee would reply "That is so, I have objected in order to obtain what I really want, namely, a direction from the court that the property be sold subject to my mortgage," and as a necessary consequence rule 63 provided what was to happen when the mortgagee failed to satisfy the court that there was any mortgagee right to be protected, and, therefore, directed that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive It is idle to say that this is either an unfair or a summary method of disposing of the mortgage It is only summary in a provisional and temporary sense The mortgagee's rights of suit are preserved It is only conclusive if he does not choose to assert them. One of the evils of usufructuary mortgages

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in these provinces is that the mortgagees sleep on their rights until the property is eaten up by interest and the ancestral property of the mortgagor leaves the family for ever, and it is obvious, and the Privy Council have, I think, emphasized the point, that by these provisions the legislature intended to accelerate decision in execution cases and to encourage mortgagees to assert their rights and not to go to sleep. In this particular case the mortgagee failed to satisfy the court. What happened is sufficiently shown by the order which runs as follows :—

> "The process-fee has been paid (but) the mortgage-deed has not been filed in spite of the time that was given twice The applicant is also absent today. There is no such incumbrance given in the report of the Sub-Registrar. The application be disallowed in default of the applicant."

The application was that of the mortgagee. He chose to stay away, to give the court no further assistance, although the court appears to have been patient with him, and he seems to have deliberately refrained from providing the materials upon which alone the court could make an order in his favour which he desired for protecting his mortgage. It may be that he was badly advised. The court seems to think, if one may read between the lines, that the mortgage had no real existence even if the mortgagee had, but whether the mortgagee was blameworthy or foolish did not much matter, because by the article of the Limitation Act with which we are now concerned he had twelve months in which to bring his suit.

I am unable to hold that that is not an order against the mortgagee. I am unable to hold that he was not claiming property in the suit dealt with in the order. Article 11 says that a suit contemplated by order XXI, rule 63, must be brought within twelve

months of the date of the order, when it is brought "by a person against whom any of the following orders has been made", and the orders referred to include orders under the Code of Civil Procedure on a claim preferred to, or an objection made to, the attachment of property attached in execution I think this was a mortgagee's claim preferred to the property and an objection made to the sale under the attachment without reference to the mortgagee rights, and that, therefore, the ordinary mortgagee's time for suing of twelve years is cut down to one year

There seems to be a tendency between the High Courts to differ on this question I say a tendency, because in Bombay and Allahabad the other view was taken under the old Act No authority has been mentioned to us under the new Act. In the case of *Durga Prasad* v *Mansa Ram* (1) I do not understand why the court did not refer to the subsequent provision as to what is to happen if the order is made against the applicant I prefer the view taken in Madras, and although it is desirable, particularly in matters of procedure, that one should be consistent if possible, because no principle is at stake, if compelled to select between the two views in this case, I find it difficult to accept the reasons given in the Bombay case, namely *Ganesh Krishna* v. *Damoo* (2) *The Madras* case—*Venkataratnam* v *Ranganayakamma* (3)—is not on all fours as regards the facts, but the reasoning is certainly applicable to this case Sir JOHN WALLIS, the Chief Justice, says that the general policy of these provisions of the Code, as explained by the Judicial Committee in *Sardhari Lal* v *Ambika Pershad* (4), is to secure a speedy settlement of questions of title raised at execution sales Further on he says "Where a claim or objection is

(1) (1904) 1 A L J , 531 (2) (1916) I L R , 41 Bom , 61
(3) (1918) I L R , 41 Mad , 985 (4) (1888) I L R , 15 Calc , 621

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preferred under rule 58 (formerly section 278) and the court rejects it under the proviso to that rule on the ground that it was designedly or unnecessarily delayed, the unsuccessful claimant or objector, in my opinion, clearly comes within the words 'the party against whom the order is made,'" and that, I think, must be held to apply to anyone in respect of whom an order has been made under order XXI, rule 63. The later case in Madras, *Lakshumanan Chettiar* v. *Parasivan Pillai* (1), is clearly in point. A petition by a simple mortgagee of the properties belonging to the judgement-debtor and attached in execution by the decree-holder, praying that the properties should be described in the sale proclamation as being subject to the simple mortgage in favour of the petitioner and sold subject to such mortgage, is a petition falling within the provisions of order XXI, rule 58, of the Code of Civil Procedure If it is dismissed after investigation or otherwise, the mortgagee is barred from suing after one year from the date of the order. In this case, whatever may be said about other cases, the absence of investigation was entirely due to the absence, or what the Subordinate Judge calls the default, of the mortgagee. I think, therefore, that this appeal must be allowed and that the suit must be held to be barred by article 11.

ASHWORTH, J.—It is contended by the appellant in this appeal that a decision by a court, that property is not subject to a mortgage, is to be deemed, under order XXI, rule 63, of the Code of Civil Procedure, conclusive against a person who has asked the court either not to sell certain property attached in execution of a decree against another person or only to sell the property as subject to his mortgage, on the

(1) (1919) 37 M.L.J., 169

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ground that such property is encumbered by a mortgage in his (the applicant's) favour. The question has to be decided by interpreting rules 58 to 63, inclusive, of order XXI. Under the Civil Procedure Code of 1882, it had to be decided by interpreting sections 278 to 283, inclusive, of that Code (hereinafter called old sections).'

Rules 62 and 63 of order XXI which, in my opinion, for all purposes relevant to the present question, are identical with old sections 282 and 283, run as follows:—

"62. Where the court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so subject to such mortgage or charge.

63. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

There is a decision of this Court in 1904 reported in *Durga Prasad* v. *Mansa Ram* (1) which decided against the contention set up This decision was based on the language of old section 282. SIR JOHN STANLEY and SIR WILLIAM BURKITT held that an order under that section was merely an order to continue the attachment subject to the mortgage and not an adjudication that the mortgage existed, which adjudication they held to be a condition precedent for the use of the section and not an order under the section that could attract the provisions of old section 283 (rule 63 of the present Code) In my opinion this reasoning is open to objection The expression "where the court is satisfied" appears to me to require, and to confer jurisdiction on, the court to

(1) (1904) 1 A L J., 581

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come to a finding of fact as to the existence of the mortgage. Without such finding of fact it can never be satisfied Section 282, therefore, in effect provides for two alternative and mutually exclusive orders. One is an order that, as the mortgage exists, the attachment shall be continued subject to it, and the other is that *no mortgage shall be deemed to exist*. The latter order, no less than the former, is an order contemplated by rule 63 or old section 283 The question of the existence of a mortgage on the property attached may be raised before the court in two ways and at two stages. One stage is when the court has to prepare the order for sale by public auction. This is provided for in rule 66 of order XXI which was formerly section 287 of the Code. There it is stated that the sale proclamation shall specify *as fairly and accurately as possible* any encumbrance to which the property is liable, after giving notice to the decree-holder and the judgement-debtor This plainly means that the court shall give effect to any inquiry made from these persons, and, if that inquiry leads it to believe that the property is subject to an encumbrance, it must notify the same. It seems to me the words " as fairly and accurately as possible " clearly indicate that this entry of an encumbrance in the sale proclamation cannot prejudice the rights of a third person. There is another stage when the matter of property being encumbered can be raised, that is to say, during the " investigation of claims and objections " Provision for such an objection is contained in rule 62 of order XXI (section 282 of the old Code of Civil Procedure).

An objection that attached property is subject to a mortgage is in effect an objection that, inasmuch as the whole bundle of rights inherent in or attached to the property are not liable to attachment or sale in execution of the decree against the judgement-debtor, the property should *either* be released from attachment *or*

the attachment of the property should only be continued subject to the mortgage It is not necessary that the objector should ask for release of the property. It is sufficient that he should ask for the continuation of the attachment being made subject to the mortgage

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A strong argument in favour of this view is also to be derived from the context of rule 62 The rule comes in the middle of a block of rules, which are commenced by a heading prefixed to rule 58, namely, " Investigation of claims and objections " It is now settled law that headings prefixed in the Bill passed by the legislature have the force of words used in the preamble of an Act and may be used as " a key to open the minds of the makers of the Act," and in this respect are unlike marginal headings, which have no force for the purpose of interpretation. A preamble cannot be used to control the enactment itself when it is expressed in clear and unambiguous terms (see page 92 of Maxwell on Statutes, 6th Edition). In the present case, however, we must hold that there is some ambiguity owing to the fact that there have been divergent decisions on this matter by different High Courts in India Once we give effect to the heading prefixed to rule 58 and to the heading suffixed to rule 63, it is clear that a matter adjudicated upon under the intermediate rule 62 is a matter involved in the investigation of claims and obections An adjudication of such claim or objection must be given effect to by an order and that order must be one contemplated by rule 63. It is common ground that if it is such an order, it will be absolute, unless a suit is brought within one year to contest it as provided by article 11 of the Limitation Act The decision in *Durga Prasad* v. *Mansa Ram* (1) was given under the Code of 1882. That

(1) (1904) 1 A L J , 531

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Code did not prefix section 278 (equivalent to rule 58) with any special heading as the present Code does. Moreover, it did not terminate this block of sections dealing with claims and objections by insertion of a fresh heading after section 283 (equivalent to rule 63). The consequence is that the argument based on the separation by headings of this block of sections was not available to the Judges who decided that case under the old Code For this reason I should be prepared to hold that that decision, even if correct, was no longer applicable. I have already held that it was not correct, because it failed to construe the opening words of section 282 as conferring by implication a duty on the court to settle the question, when raised, of the existence of a mortgage. For these two reasons I am not disposed to follow that decision.

On the other hand, I consider that the decision in *Venkataratnam* v. *Ranganayakamma* (1) contains cogent reasons for the view taken in that decision. It is true that that decision did not consider the argument arising from the fact that under rule 58 a claim must be made to the property *on the ground that such property was not liable to attachment*; but I have already considered this argument. Indeed the words in rule 58 " on the ground that such property is not liable to attachment " must, in my opinion, have reference merely to a case where " an objection is made to an attachment " and not reference to a claim preferred to the property. In this view, any claim preferred to the property under rule 58 would be an objection liable to adjudication by the court if such claim were inconsistent with the continuation of an unqualified attachment, although consistent with a qualified attachment.

(1) (1918) I L R., 41 Mad , 985

For the above reasons I concur that this appeal should be allowed with costs.

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BY THE COURT —This appeal is allowed and the suit dismissed with costs.

Appeal allowed.

Ainsworth, J.

REVISIONAL CRIMINAL.

Before Mr Justice Sulaiman

EMPEROR v BABU RAM AND OTHERS.*

1927 April, 25.

Act No III of 1867 (*Public Gambling Act*), *section* 13—*Gambling*—"*Public place*"

Held on a construction of section 13 of the Public Gambling Act, 1867, that a particular place, though private, may become a public place on a particular occasion, for instance, when the members of the public are really present there But unless such is the case, a private place cannot be called a public place merely because if some member of the public were to pass close by, he might have an opportunity of seeing what was going on there It must be a place either open to the public or actually used by the public, the mere publicity of the situation not being sufficient

Queen-Empress v *Sri Lal* (1), followed. *King-Emperor* v *Ajudhia Prasad* (2) and *Ahmad Ali* v *King-Emperor* (3), referred to . *Emperor* v *Sukhnandan Singh* (4), distinguished

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court

The applicants were not represented.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown

SULAIMAN, J :—The only point in this case is whether gambling took place in a public place within the meaning of section 13 of the Public Gambling Act

* Criminal Reference No 124 of 1927

(1) (1895) I L R , 17 All , 166
(2) Weekly Notes, 1901, p. 92
(3) (1904) 1 A L J , 129
(4) (1921) I L R , 44 All , 265

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The applicants were gambling outside the city of Mainpuri in a plot of land bearing No. 2574. The land is private property but is vacant land. It is surrounded on three sides by fields and on the fourth side is the Esan stream. There is not even a foot-path going over the place where the gambling was going on. No doubt close to the place there is a *peepal* tree which is situated on the bank of the Esan river, but it is not suggested that this is a place of worship where the public have ordinarily access A *pakka* road is 320 paces from the spot and another narrow *kachcha* way is 150 paces from it In fact this narrow *kacheha* way is on the boundaries of the field and passes close to the south of it. The learned Sessions Judge inspected the locality and his impression was that the place could never be a public place.

On the authorities of this Court it is clear that the place, as described above, could not be held to be a public place. This expression finds place in section 159 of the Indian Penal Code, and a Bench of this Court in *Queen-Empress* v. *Sri Lal* (1) held that there was a great distinction between doing an act in public and doing an act in a public place, and that a place to which the public had not by right, permission, usage or otherwise, access, could not be a public place even though it were close to a public street so that any member of the public walking along the street could see what was going on there The way in which this expression occurs in section 13 of the Public Gambling Act, suggests that the above observation is still more appropriate. Gaming is prohibited in " any public street, place or thoroughfare " The word " place " is used in conjunction with " street" and "throughfare" and could not have been intended to apply to a private place which might be open to public view. Of

(1) (1895) I L R , 17 All., 166

course, a particular place though private may become a public place on a particular occasion, for instance, when the members of the public are really present there. But unless such is the case, a private place cannot be called a public place merely because if some member of the public were to pass close by he might have an opportunity of seeing what was going on there. It must be a place either open to the public, or actually used by the public, the mere publicity of the situation not being sufficient.

In *King-Emperor* v *Ajudhia Prasad* (1) it was held that a private grove did not become a public place merely because a foot-path passed through it. In *Ahmad Ali* v *King-Emperor* (2) a private grove was held not to be a public place although its boundary wall was broken at places and people could pass through it when going to the bazar. The case of *Emperor* v *Sukhnandan Singh* (3) is clearly distinguishable because there the public had actual access to the grove, without their access being refused or interfered with, indeed a public fair was in actual progress at the time in the grove where gambling was going on.

I am, therefore, of opinion that the conviction of the accused persons was illegal. I accordingly allow this reference and setting aside the convictions and the sentences passed on Babu Ram, Niaz Mohammad, Asharfi Lal, as well as Buddhu and Shiam Behari, acquit them of the offence with which they were charged and order that the fines, if realized, should be refunded.

Reference allowed —Convictions quashed.

(1) Weekly Notes, 1901, p. 92 (2) (1904) 1 A L J., 129
(3) (1921) I L R., 44 All., 265

REVISIONAL CIVIL.

Before Mr. Justice Lindsay

1927 *April*, 25

KISHORE CHAND, SHIB CHARAN LAL (PLAINTIFF) *v.* B B AND C. I. RAILWAY AND ANOTHER (DEFENDANTS).*

Act No IX of 1890 (*Indian Railways Act*), *section* 72 (2) (*b*) *—New form of risk-note H—Suit for damages for short delivery—Pilferage not pointed out to the servants of the railway administration on or before delivery.*

Plaintiffs sued a railway company for damages on the allegation that one of a number of bales consigned by them had been cut in transit and a portion of its contents abstracted, but there was no allegation that any pilferage from a package or packages had been pointed out to the servants of the railway administration on or before delivery. The claim of the plaintiffs had been notified to the railway company some four months after delivery under section 77 of the Railways Act. *Held*, that the railway administration was not liable under clause (*b*) of the proviso to risk-note form H, and, therefore, the suit must fail.

Secretary of State for India in Council v. *U. P. Glass Works* (1), referred to

THIS was an application under section 25 of the Small Cause Courts Act, 1887. The facts of the case so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Munshi *Sarkar Bahadur Johari*, for the applicant.

Pandit *Ladli Prasad Zutshi*, for the opposite parties

LINDSAY, J.:—This is a plaintiff's application under section 25 of the Small Cause Courts Act. The suit was a suit to recover damages from the railway systems for short delivery, the allegation being that one of a number of bales of cotton yarn had been cut and some bundles extracted. The Judge of the Small

* Civil Revision No 24 of 1927

(1) (1926) I.L.R. 48 All., 584.

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KISHORE CHAND, SHIB CHARAN LAL v. B B. AND C I. RAILWAY

Cause Court has found on a preliminary issue that the defendant railway companies were absolved from all liability by reason of the provisions of risk-note form H, which had been executed by the plaintiffs. In dismissing the claim he referred to a judgement of this Court in *Secretary of State for India in Council* v *U. P. Glass Works* (1). In this case Mr. Justice DANIELS gave a judicial interpretation of the contents of the new risk-note form H, with which we are concerned in this case, and relying upon that interpretation the Judge of the court below held that the plaintiffs could not recover. The case which was before DANIELS, J., was a case of non-delivery which would be covered by clause (*a*) of the proviso to risk-note form H. In the present case the plaintiffs could not set up any claim under this clause of the proviso, but it is argued that they could have, and did set up, a claim under clause (*b*). Clause (*b*) deals with pilferage from a package or packages forming part of a consignment properly packed, when such pilferage is pointed out to the servants of the railway administration on or before delivery. I have examined the pleadings in this case and it is quite clear, as the Judge in the court below observes, that the plaintiffs founded no claim on clause (*b*) of this proviso. It is true, no doubt, that they asserted that one of the bales had been cut and that a portion of the contents of the bale had been removed, but it was necessary for them to allege much more than this in order to establish any case under clause (*b*) and in order to throw on the railway administration the burden of producing evidence to show how the consignment had been dealt with while it was within the administration's control. There is no allegation in the plaint that any pilferage from a package or

(1) (1926) I L R. 48 All. 584

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packages was pointed out to the servants of the railway administration on or before delivery.

In the second paragraph of the plaint the short delivery was alleged and all that was stated was that the claim of the plaintiffs had been notified to the railways some four months after, under section 77 of the Railways Act. On those allegations there was before the court no case of a claim to hold the railway administration liable under clause (*b*) of the proviso That being so, I think the suit was, for this reason, bound to fail. I certainly would not allow the case to be re-tried now so as to give these plaintiffs an opportunity of introducing evidence at this stage, evidence which it would probably be impossible for any court to accept. The application is, therefore, refused with costs

Application dismissed.

APPELLATE CIVIL.

Before Justice Sir Cecil Walsh and Mr Justice Ashworth.

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April, 25

MANOHAR LAL (PLAINTIFF) *v.* BALDEO SINGH AND OTHERS (DEFENDANTS) *

Act (Local) No II of 1901 (*Agra Tenancy Act*), *section* 194—*Suit by one of several co-sharers against a tenant for the whole of that tenant's rent—Co-sharer not agent for the others and no special agreement*—Res judicata.

One of several co-sharers cannot sue for the whole rent due to all the co-sharers by the tenants of a holding owned by them all, unless he is an agent appointed by the entire body of co-sharers

The fact that the defendants may not in previous suits have raised the plea that the plaintiff was not entitled

* Second Appeal No 347 of 1926, from a decree of A. G P. Pullan, District Judge of Agra, dated the 27th of November, 1924, reversing a decree of Syed Muhammad Athar, Assistant Collector, First Class, of Agra, dated the 9th of January, 1924

to sue alone does not, by application of the principle of *res judicata*, give him a right to sue alone.

THE facts of this case were, briefly, as follows —

The plaintiff, one Pandit Manohar Lal, was a co-sharer in the property concerned along with six others and they were also *mutawallis* for a certain idol The plaintiff sued one of the tenants for rent—for the whole of the rent payable by him—and an Assistant Collector gave him a decree The defendant appealed, and the District Judge set aside the Assistant Collector's decree and dismissed the suit. The plaintiff appealed to the High Court

Munshi *Narain Prasad Ashthana*, for the appellant.

Munshi *Girdhari Lal Agarwala* and Babu *Joti Sarup Gupta*, for the respondents.

The judgement of WALSH, J., after briefly stating the facts, thus continued :—

Primâ facie the suit was bad under section 194 of the Tenancy Act, which provides the general rule of procedure familiar in such cases to English lawyers, that co-sharers in any right, title or interest shall do any act conjointly, unless they have appointed an agent to act on behalf of all of them, and the defendant pleaded, in my judgement, and in that of the District Judge, quite rightly, that the claim was barred by section 194. The language was not apt, because the objection is one well-known to English pleaders as a plea in abatement, not a plea in bar, that is to say, it is an objection to the success of the suit as the record stands, but not a fatal objection, as the District Judge points out in his judgement, but one which may be cured by the proper proceedings When the objection is raised, it is open to the plaintiff either to join his other co-sharers as plaintiffs,

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Walsh, J

which he is entitled to do as of right, by offering them an indemnity, or to make them defendants: but if the real fact is, as frequently happens, that he is either obstinate, or afraid of meeting them in fair fight, he prefers not to do so, but to trust to the chances of success before an indifferent court against a defendant who has not the same materials for fighting an issue on the merits. If he does that, he is, if he comes before a court which understands the case, hoist by his own petard, and the suit must fail.

In this case he seeks to avoid the effect of the rule laid down in section 194, and this is the main point which has been argued on his behalf in appeal, by relying upon a special contract as mentioned in sub-section (2) of the same section. In a court of law which dealt with these matters strictly, he would have to plead such a special contract. It was not pleaded and unfortunately no issue on the subject was framed. An issue certainly ought to be framed because it is a special matter taking the case out of a statutory provision which would certainly prevail if the special matter pleaded were not found in favour of the plaintiff. As a matter of fact, so far as I understand the matter, this special contract is not one which comes within the section at all. One can hardly expect an Assistant Collector to pay much attention to pleadings, and possibly not to the correct legal phraseology when he comes to frame his issues, but one can at least expect him to read the section which he is supposed to be applying to the facts of the case. In the same paragraph in which he states that the plaintiff had been collecting the whole rent with regard to the "*khatas*" in the suit during past years, he goes on to say that it is evident that the plaintiff is entitled to sue alone under special contract. The special contract provided by sub-section (2) of section 194 has

nothing whatever to do with the right of a plaintiff to sue for the whole rent, and is quite irrelevant, as the Assistant Collector would have seen if he had troubled to read the section which he was apparently applying. The general rule being that the plaintiff cannot sue alone for his share, sub-section (2) allows him to do so if there is a special contract by which a co-sharer in an undivided property is entitled to receive separately his share of the rent payable by a tenant.

In my view Mr *Girdhari Lal Agarwala* is right in saying that the tenant must have notice of such special contract, because it is difficult to see how he is to know anything about his share of the rent payable by him, unless the subject-matter of the special contract is communicated to him. The learned Judge apparently treated this point with contempt and I am not surprised He certainly found facts inconsistent with the existence of the special contract, but he did not actually draw attention to what I myself think is the answer to the plaintiff's reply

The Assistant Collector seems also to have treated the provisions of the *wajib-ul-arz* with a certain amount of indifference, because there is a fundamental inconsistency between the view which he has taken and that taken by the District Judge The Assistant Collector says, "the *wajib-ul-arz* supports the special contract" While I do not profess to understand what this means, I infer that the Assistant Collector thought that the *wajib-ul-arz* gave the plaintiff alone the right to collect the whole rent If this is what he thought, he must have been mistaken, because the District Judge says that under the *wajib-ul-arz*, all the *mutawallis* are entitled to collect rents, which appears to me to be a totally different interpretation

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The result, therefore, is that the plaintiff's suit is defective, that the plaintiff has deliberately refrained from applying the necessary remedy to cure what is otherwise a fatal defect, and having set up a special reply to the defect that reply has failed, and there is nothing left for him to fall back upon. The District Judge finds that the suit is not a *bonâ fide* one but has been brought apparently in an attempt by the plaintiff to get a decision favourable to himself against a tenant in the dispute which is going on between himself and his *co-mutawalli*. I agree with the judgement of the District Judge.

I might add that a further point was argued by the appellant that there was *res judicata*, but I am content to say with regard to that that I am satisfied that it is not *res judicata*. The appeal must be dismissed with costs.

ASHWORTH, J.:—The plaintiff is suing for the whole amount due from the defendants tenants in respect of a holding, although admittedly there are other persons besides himself who are co-sharers in the holding as proprietors. Section 194 precludes such a suit by one co-sharer, except in two cases. One case is where the co-sharer sues as an agent appointed on behalf of all the co-sharers, the other case is where there is a local custom or special contract entitling one co-sharer to receive separately his share of the rent payable by a tenant. The second case has no application to the present suit, inasmuch as the suit is not by the plaintiff merely for his share but for the whole rent due to all the co-sharers. The first case is also not applicable because the plaintiff does not sue as agent on behalf of the co-sharers. He appears to me, on the strength of an agreement with the other co-sharers, to have sued as entitled to the rent in his own right, whereas under that agreement, at the most, he was only entitled to sue as agent for all the co-sharers.

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It has been urged that because the defendants did not raise the plea, in two previous similar suits, that the plaintiff was not entitled to sue for recovering the whole rent from the defendants, therefore in some way he is debarred by the rule of *res judicata* from now raising that point. In my opinion where the law forbids a certain thing being done in a suit, no amount of failure by a defendant in previous suits to plead the positive bar created by legislature will prevent its being taken up in a subsequent suit, and this is what the District Judge said in his judgement.

Ashworth, J

For the above reasons I concur in the finding and would dismiss the appeal

Appeal dismissed.

Before Mr. Justice Sulaiman and Mr Justice Banerji

BANWARI LAL AND ANOTHER (DEFENDANTS) *v.* NAND RAM AND OTHERS (PLAINTIFFS) *

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April, 26

Mortgage—Suit for sale—Omission of mortgagee to implead transferee of part of mortgaged property—Subsequent suit against such transferee barred.

If a mortgagee sues on his mortgage and neglects to implead a transferee of part of the mortgaged property, he cannot, after limitation has expired, bring a separate suit against the transferee so omitted, calling upon him to redeem the mortgage *Hargu Lal Singh* v *Govind Rai* (1), followed.

In this case the plaintiffs were mortgagees under a mortgage, dated the 19th of February, 1908 In 1918 part of the mortgaged property was sold by auction in execution of a simple money decree, and subsequently, on the 3rd of January, 1921, the auction-purchaser sold a portion of the property he had purchased. In 1920 the mortgagee instituted a suit for sale, but without impleading the auction-purchaser A decree for sale was obtained and in

* Second Appeal No 463 of 1925, from a decree of E T Thurston, District Judge of Budaun, dated the 24th of November, 1924, reversing a decree of Rup Kishan Agha Subordinate Judge of Budaun, dated the 31st of October, 1923

(1) (1897) I L R, 19 All, 541.

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execution of it the mortgaged property was put up for sale and purchased by the plaintiffs decree-holders. When they went to the revenue court to get mutation of names effected, they were resisted by the auction-purchaser, with the result that the revenue court refused to enter their names in the revenue papers. The mortgagees then brought the present suit praying that the defendants should be called upon to redeem them and in default that their rights should be foreclosed.

The court of first instance dismissed the suit; but in appeal the District Judge decreed it. The defendants appealed to the High Court.

Babu *Piari Lal Banerji* and Maulvi *Muhammad Abdul Aziz*, for the appellants.

Munshi *Harnandan Prasad*, for the respondents.

The judgement of the Court (SULAIMAN and BANERJI, JJ.), after setting forth the facts as above, thus continued :—

The court of first instance held that the plaintiff's suit was not maintainable against the contesting defendants. The learned District Judge has come to a contrary conclusion. He has relied mainly on the principle laid down in the case of *Babu Lal* v. *Jalakia* (1). He has pointed out that the soundness of the view expressed in that case was not accepted by another Bench in the case of *Ram Narain* v. *Somi* (2). The learned vakil for the appellant has further relied on the recent case of *Lachmi Narain Das* v. *Hirdey Narain* (3), which is in conformity with the second case. In our opinion, none of these cases is directly in point, for in all these cases the competition was between a prior mortgagee and a subsequent mortgagee, both of whom had obtained decrees on their mortgages without impleading the

(1) (1916) 14 A.L.J., 1146 (2) (1922) I.L.R., 45 All., 189
(3) (1926) 24 A.L.J., 661

other. It is, therefore, unnecessary for us to express any view on the conflict of opinion in the cases referred to above.

In the present case the defendants were purchasers in execution of a simple money decree of a part of the interest of the mortgagor They were, therefore, representatives of the mortgagor and not of the subsequent mortgagees They were necessary parties to the suit brought by the plaintiff on his mortgage If the plaintiff failed to implead them in his suit and the limitation had now expired, it is no longer open to the plaintiff to recover possession of the property from these defendants who are in the position of mortgagors It is too late for the plaintiff to call upon them now to redeem his mortgage on the risk of losing all their interest in the property

The present case is governed by the Full Bench case of *Hargu Lal Singh* v. *Govind Rai* (1), where under similar circumstances, it was held that a subsequent suit against the representative of the mortgagor, who had not been impleaded, was not maintainable The learned vakil for the respondents has sought to rely on the case of *Ganpat Lal* v *Bindbasini Prashad Narayan Singh* (2), decided by their Lordships of the Privy Council. That case, in our opinion, had no application. There certain minor members of a joint Hindu family, who had been impleaded in a mortgage suit, were not properly represented inasmuch as no proper guardian *ad litem* had been appointed. After the decree and the sale, they sued for a declaration that their right of redemption was intact. In the plaint they did not object to the mortgage, nor to the decree, nor to the sale Their Lordships held that without trying to set aside

(1) (1897) I L R, 19 All, 541 (2) (1920) I.L R, 47 Calc, 924

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these, the suit for the declaration was not maintainable It is obvious that in that case the utmost that had happened was an irregularity in the omission to appoint a guardian *ad litem*. Even if the suit were to be decreed, the former would have had to be restored and proper guardians appointed. When the plaintiffs were not challenging the debt, the decree and the sale, their Lordships held that their right of redemption was lost That case, therefore, is not in point. We accordingly allow this appeal and, setting aside the decree of the lower appellate court, restore that of the court of first instance with costs in all courts.

Appeal allowed.

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kendall.

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DAYA RAM AND ANOTHER (PLAINTIFFS) *v.* MURLI DHAR AND ANOTHER (DEFENDANTS) *

Act No. IX of 1872 (*Indian Contract Act*), *section* 30—*Principal and agent—Wagering contract—Breach of contract by principal—Liability incurred by agent Duty of principal to indemnify.*

A person who acts merely as a commission agent for the sale or purchase of goods for future delivery is not debarred from recovering his commission and such incidental expenses as he may have been put to, by reason of the fact that, as between the principals, the transaction may have been of the nature of a wagering contract. *Budhi Chand* v. *Kachchu Mal* (1), *Hardeo Das, Nanak Chand* v. *Ram Prasad, Shyam Sundar* (2) and *Sobhagmal Gianmal* v. *Mukund Chand Baha* (3), referred to.

THIS was a plaintiffs' appeal arising out of a suit brought by them for the recovery of Rs. 3,346-6-0

* Second Appeal No 428 of 1925, from a decree of H Beatty, Additional Judge of Saharanpur, dated the 28th of November, 1924, confirming a decree of Rama Das, Subordinate Judge of Saharanpur, dated the 26th of October, 1922

(1) (1923) I L R , 45 All , 503 (2) (1926) I.L.R., 49 All., 438.
(3) (1926) I L.R., 51 Bom , 1.

alleged to be due to them from the defendants respondents on account of certain *khatti* transactions.

The plaintiffs' case was that they carry on the business of commission agents for the purchase and sale of *khattis* and that, on instructions received from the defendants respondents by means of a telegram dated the 12th of March, 1916, they, on the 13th of March, 1916, sold, on the defendants' behalf, to certain persons eleven *khattis* and agreed to deliver the same to the purchasers in Jeth. They alleged that the defendants did not deliver the *khattis* in the month of Jeth, inasmuch as the rate of grain had risen in the interval, and in order to carry out their business with the vendees of the *khattis* they (the plaintiffs) had to pay the difference to the purchasers of the *khattis* between the market rate prevailing on the 13th of March, 1916, and on Jeth badi 15th. The plaintiffs alleged that they had to pay to the purchasers of the *khattis* a sum of Rs. 3,046-5-6 and this they were entitled to recover from the defendants, their principals, with interest, and were also entitled to get a certain amount on account of their commission

The defence to the suit was that the transaction relating to the eleven gram-pits in dispute was by way of wager and, as a matter of fact, there was no intention to deliver the goods It was further contended by the defendants that on account of certain amendments in the Gambling Act of 1867, a commission agent could not bring a claim in respect of losses sustained by him in connexion with *badni* transactions or wagering contracts

Both the courts below held that the transaction in dispute was by way of wager, and, further, that the plaintiffs were, because of the provisions of the United Provinces Act No. I of 1917, disentitled to

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recover from the defendants the amount that the plaintiffs alleged they had paid to the vendees of the eleven *khattis*. The plaintiffs appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellants.

Dr. *M. L Agarwala* and Munshi *Baleshwari Prasad*, for the respondents.

The judgement of the Court (IQBAL AHMAD and KENDALL, JJ.), after stating the facts as above, thus continued :—

We are unable to agree with the decisions of the courts below. Even if it be assumed that the forward contract entered into by the plaintiffs as agents on behalf of the defendants was a wagering contract, the defendants cannot, as against the plaintiffs, who were their agents, plead the illegality of that contract as a defence in an action brought by the plaintiffs to recover from the defendants, their principals, any money that the plaintiffs had to pay to the vendees of the eleven *khattis* in consequence of the breach of the contract committed by the plaintiffs in not delivering the *khattis* on the due date. The plaintiffs, as the defendants' agents and acting in accordance with their directions, made a certain contract on behalf of the defendants with third parties Under the contract so entered into, both the plaintiffs and the defendants were under an obligation to the purchasers of the eleven *khattis* to perform their obligations or to pay damages for their breach. The plaintiffs having entered into a contract with the purchasers of the eleven *khattis* as agents of the defendants, the defendants were *primâ facie* liable to indemnify the plaintiffs against any liability incurred in respect of that contract. It is to be remembered that the plaintiffs in no way stood to gain

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or to lose anything by the contract which they entered into on the defendants' behalf. If the price of the grain had gone down in the interval between the date of the sale of the eleven *khattis* and the date on which delivery of those *khattis* was to be made to the purchasers, the benefit arising from the fall in the market rate would have gone to the defendants. The plaintiffs could not have been entitled to share in the benefit thus accruing to the defendants Equally so, if there has been a loss because of the rise in the price of the grain between the date of the sale of the *khattis* and the date for the delivery of those *khattis* to the purchasers, that loss must be borne by the defendants, and if the plaintiffs have had to pay to the vendees of the *khattis* any amount on account of the loss occasioned by rise in the price of the grain, they are entitled to recover that amount from the defendants. As was pointed out by their Lordships of the Privy Council, in the case of *Sobhagmal Gianmal* v. *Mukund Chand Balia* (1), as between the plaintiffs and the defendants " neither party stands to win from or to lose to the other according to the fluctuation of price or any other event The very essence of a wager between them is thus absent "

In short, even if the contract relating to the eleven *khattis* was by way of wager, there was no element of speculation so far as the plaintiffs were concerned The plaintiffs were only entitled to get their commission for acting as agents of the defendants In view of the decisions in the cases of *Bidhi Chand* v. *Kachchhu Mal* (2) and *Hardeo Das Nanak Chand* v. *Hari Prasad Shyam Sundar* (3), we hold that if the plaintiffs actually sold eleven *khattis* as agents on behalf of the defendants and if they had to make good to the

(1) (1926) I L R , 51 Bom , 1 (2) (1923) I L R , 45 All ,
(3) (1926) I L R , 49 All , 458

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purchasers the difference between the market rate prevailing on the date of the agreement of sale and on the date of delivery, they are entitled to a decree for that amount as against the defendants.

But it is argued that a person entering into a wagering contract is guilty of an offence punishable under section 13 of Act No. III of 1867 as amended by United Provinces Act No. I of 1917, and that a person who acts as an agent and enters into such a contract on behalf of the principal is not entitled to recover any amount from his principal, inasmuch as an agent employed to do any illegal act is not entitled to be re-imbursed by the principal for the loss that he has sustained in consequence of acting as an agent for the furtherance of an illegal act. We are unable to agree with this contention. It is true that it is provided by Act I of 1917 that gaming includes wagering, and as such any person who is found wagering, in any "public street, place or thoroughfare" situated within the limits to which Act No. III of 1867 applies, will be guilty of an offence punishable under section 13 of that Act. But in the present case it is nobody's case that either the defendants or the plaintiffs were found wagering in any "public street, place or thoroughfare" and as such section 13 of Act No. III of 1867 has no application to the present case.

For the reasons given above we hold that if the plaintiffs really entered into a contract of sale of eleven *khattis*, in pursuance of the defendants' directions, and if they actually paid any amount on account of difference in the market rate to the vendees of the eleven *khattis*, they are entitled to a decree for the amount so paid by them as well as for their commission charges. But on these points there is no definite

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ACTS—1856—XV (HINDU WIDOWS RE-MARRIAGE ACT), SECTION 2—*Hindu widow—Widow entitled to re-marry prior to* 1856 | The provision contained in section 2 of the Hindu Widows Re-marriage Act, 1856, whereby a Hindu widow on re-marriage forfeits all her rights and interests in her deceased husband's property does not apply to a Hindu widow who was permitted to re-marry prior to 1856 *Gojadhar* v *Kunnailla*, I L R., 31 All , 101, followed

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 174, *See* Act (Local) No III of 1901, section 147 205, 215

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 199—*Written statement—Civil Procedure Code, orders VI, VIII, X and XIX* | A defendant cannot be convicted under section 199 of the Indian Penal Code simply on account of a statement made by him in a written statement filed under order VIII, rule 1, of the Code of Civil Procedure *Chandi Prasad* v *Abdur Rahman*, I. L. R., 22 Calc , 131, referred to

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 201—*Section not inapplicable to principal offender—Unexplained death by poison of member of family—Presumption as to complicity of other members —Act No I of* 1872 *(Indian Evidence Act), section* 24—*Confession made to a mukhia, admissibility of*— | A violent presumption arises when a man dies in his own house surrounded by his own family, and poisoned, shortly after eating food which must have been prepared for him by his wife, and no explanation is forthcoming from the members of the household as to what had happened to him to cause his death And where, in addition to such violent presumption, the persons accused are proved to have been guilty of persistent lying in an attempt to account for the absence of the deceased and are also shown to have hidden the corpse to save themselves, the presumption becomes a certainty

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A person who has actually committed a crime himself—whether murder or any other crime—is none the less guilty of removing traces thereof, if it is proved against him that he has done so, because he was the person who actually committed the offence. *Empress* v. *Kishna*, I. L. R., 2 All., 713, and *Queen-Empress* v. *Dungar*, I. L. R., 8 All., 252, overruled.

The mere removal of a body from one place to another so as to remove traces of the place where the murder took place, or indications which implicate a particular individual, even though such removal does not remove undoubted evidence that a murder has taken place, is within section 201 of the Indian Penal Code. *Emperor* v. *Autar*, I. L. R., 47 All., 306, followed.

Where one of the accused volunteered to make a confession to a *mukhia*, if he could get some assurance from him (the *mukhia*) that he would do his best to help the accused. *Held*, that such confession was not precluded from being received as evidence by reason of section 24 of the Indian Evidence Act, 1872.

Emperor v. Har Pari, I. L. R., 49 All. 67

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 323—*Criminal Procedure Code, section 106—Security to keep the peace—Summary trial—Notes of evidence not kept.*] Where a magistrate trying a case summarily made some notes of the evidence given but destroyed them: *held* that this was a sufficient cause for setting aside the conviction.

Held also that a magistrate having convicted an accused person under section 323 of the Indian Penal Code cannot bind him over to keep the peace under section 106 of the Code of Criminal Procedure unless he also finds that the offence was one involving a breach of the peace. *Amudi Sheikh* v. *Queen-Empress*, I. L. R., 27 Calc., 450, *Satish Chandra Mitra* v. *Manmatha Nath Mitra*, I. L. R., 18 Calc., 280, and *Muhammad Rahim* v. *Emperor*, 23 A. L. J., 1053, referred to.

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 341—*Criminal Procedure Code, section 345 (1)—Composition of offence.*] An offence under section 341, Indian Penal Code, may be compounded without the permission of the court under section 345 (1) of the Code of Criminal Procedure. It is, therefore, unnecessary that a composition should be arrived at after a complaint has been filed in court. *Kumaraswami Chetty* v. *Kuppuswami Chetty*, I. L. R., 41 Mad., 685, referred to.

Emperor v. Tarpey, I. L. R., 49 All. 484

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 459—*House-breaking—Causing of grievous hurt after the entry is completed.*] *Held*, on a construction of section 459 of the Indian Penal Code, that the offence of house-breaking is complete when entry into the house is effected and any grievous hurt subsequently caused by the persons breaking into the house cannot be said to be grievous hurt caused while they were committing the house-breaking.

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ACTS—1867—III (PUBLIC GAMBLING ACT), SECTION 13—*Gambling—"Public Place."*] *Held* on a construction of section 13 of the Public Gambling Act, 1867, that a particular place, though private, may become a public place on a particular occasion, for instance, when the members of the public are really present there. But unless such is the case, a private place cannot be called a public merely because if some member of the public were to pass

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close by, he might have an opportunity of seeing what was going on there. It must be a place either open to the public or actually used by the public, the mere publicity of the situation not being sufficient.

Queen-Empress v. *Sri Lal*, I. L. R., 17 All., 166, followed. *King-Emperor* v. *Ajudhia Prasad*, Weekly Notes, 1904, p. 92, and *Akmad Ali* v. *King-Emperor*, 1 A. L. J., 129, referred to. *Emperor* v. *Sukhanandan Singh*, I. L. R., 44 All., 263, distinguished.

Emperor v. Bhoo Rani, I. L. R., 49 All. 913

ACTS—1867—XXV (PRESS AND REGISTRATION OF BOOKS ACT), SECTION 9, CLAUSE (c)—"*Delivered out of the Press*"—*Term not merely synonymous with "printed"?* *Held*, on a construction of section 9(c) of the Press and Registration of Books Act, 1867, that the words "delivered out of the press" are not merely synonymous with "printed," but include at least the further processes of folding and binding necessary to make a book out of the printed matter, if not the actual carrying of the book outside the Press

Emperor v. Kishan Lal, I. L. R., 49 All .. . 915

ACTS—1870—VII (COURT FEES ACT), SECTION 7, CLAUSE (v) *(c)—Court fee—Suit for possession of land not paying revenue—Suit overvalued by plaintiff—Defendant not debarred from filing an appeal on a correct valuation.*] Where a plaintiff in a suit for possession overvalues the property claimed and the suit is decided by a higher forum than that by which it would otherwise have been tried, and is decreed, the defendant appellant can, nevertheless, confine the court fee on his appeal to the amount required by the valuation of the subject-matter according to law. He is not estopped by having had the advantage of the original suit being tried by a higher forum. An appellant, if he has paid a sufficient court fee, is not bound by his incorrect statement of value. He may be allowed to correct it

Bhagwan Das v. Secretary of State for India in Council, I. L. R., 49 All 909

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTIONS 17 TO 20; 115—*Mortgage—Suit for redemption—Admission in mortgage-deed as to amount of consideration received differing from endorsement made by sub-registrar.*] Where the question was as to the exact amount which it was necessary for the mortgagor to pay to redeem a usufructuary mortgage it was *Held* that a statement contained in the mortgage-deed that the mortgagor had received a particular sum at the time of registration could not be taken into account as against the endorsement of the sub-registrar that a different (and lesser) sum had been paid by the mortgagee

Raz Bahadur Singh v. Raghubir Prasad, I. L. R., 49 All. 707

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 24, *See* Act No. XLV of 1860, section 201 67

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTIONS 35 AND 57, *See* Hindu law 846

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 45. *See* Trade-mark 93

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 65—*Suit on a mortgage—Deed not produced nor loss satisfactorily explained—Pleadings—Alternative pleas of non-execution and payment—Plea of payment no admission of the deed.*] Plaintiff sued upon an alleged mortgage, but did not produce the deed on which he relied. He stated that it had been lost on the way to court, but failed to produce any evidence which satisfied either the trial court or the lower

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appellate court that the deed had in fact been lost: *Held*, that, subject to the provisions of section 65 of the Indian Evidence Act, 1872, the plaintiff's suit could not be maintained.

Held also, that there is no objection to the defendant in a suit on a bond raising as alternative pleas the denial of execution and payment; the raising of the second plea will not amount to an admission of the bond and will not relieve the plaintiff from the necessity of proving the loss of the original.

Sri Ram v. *Ram Lal*, 11 A. L. J., 255, *Mulla* v. *Deo Karan*, 11 A. L. J., 741, *Chunni Kuar* v. *Udairam*, I. L. R., 6 All. 74, *Hatton* v. *Ward*, 19 L. J., Q. B., 263, and *Haward* v. *Robinson*, 7 B. & C., 90, referred to.

Muhammad Zafar v. Zahur Husain, I. L. R., 49 All ... 78

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 90—*Presumption—Document more than thirty years old—Appeal—Pleadings—Omission of points which should have been raised and made subject of an issue in the trial court.*] The presumption allowed by section 90 of the Indian Evidence Act, 1872, that a document more than thirty years old was executed by the party by whom it purported to be executed also includes the presumption that where the signature of the executant purports to have been made by the pen of a scribe the scribe was duly authorized to sign for the executant. *Haji Sheikh Bodha* v. *Sukhram Singh*, I. L. R., 47 All., 81, followed.

An appellate court ought not, as a matter of practice, to allow points to be raised before it which should have been alleged in the pleadings and made the subject of an issue and argument and of decision by the trial court and also stated in the grounds of appeal clearly and directly.

Balkaran Singh v. Dulari Bai, I. L. R., 49 All. ... 55

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 92—*Act No. XXVI of 1881 (Negotiable Instruments Act), section 46—Admissibility of evidence—Promissory note—Evidence to show that note was given subject to certain conditions.*] Evidence to show that an instrument like a promissory note, the title to which generally passes by delivery, was delivered conditionally or for a special purpose only, and not for the purpose of transferring absolutely the property therein, is not only admissible but is precisely the class of evidence contemplated by the provision in section 46 of the Negotiable Instruments Act and in section 92 of the Indian Evidence Act. *Sri Ram* v. *Sahha Ram Gopal Rai*, I. L. R., 44 All., 521, dissented from. *New London Credit Syndicate* v. *Neale*, 2 Q. B., 487, followed.

There is no difference in substance, but only in illustration and application, between the provision in section 46 of the Negotiable Instruments Act and proviso 3 to section 92 of the Indian Evidence Act.

Sheo Prasad, Ram Prasad v. Gobind Prasad, I. L. R., 49 All 484

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 92, PROVISIONS 1 TO 3—*Admissibility of evidence—Sale-deed—Evidence to show parties' intention that no title would pass.*] There is nothing in law to render invalid a sale of property by one person to another for the sole reason of giving that other person a right to register a mortgage-deed in respect of other property in a particular place

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Evidence that a sale-deed was not intended by the parties thereto to be operative for the purpose of passing title is inadmissible

So *held* by ASHWORTH, J.

Dictum in Ameer Ali and Woodroffe's "Commentary on the Indian Evidence Act, 1872," that "although evidence to vary the terms of an agreement is not admissible, yet evidence is admissible that there is not an agreement at all" criticized

Lachman Das v. Ram Prasad, I. L. R., 49 All ... 650

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 106—*Burden of proof—Negligence—Property adjacent to railway line burnt by spark from engine—Liability of railway company.*] On suit against a railway company based on the allegation that certain property belonging to the plaintiff, being at the time near the railway line, had been destroyed by reason of sparks flying from an engine: *held* that it was on the railway company to show that they had taken proper precautions to avoid damage to property adjacent to the line by reasons of sparks from engines.

The Secretary of State for India in Council v. Dwarka Prasad, I. L. R., 49 All. 569

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 123, *See* Criminal Procedure Code, sections 337 and 215 181

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 7, 8 AND 9—*Banker and customer—Enhancement of rate of interest charged on overdrafts—What amounts to notice to customer.*] The mere sending of a notice by a bank to one of its customers that the interest charged on overdrafts against security held by the bank had been raised is not of itself sufficient to render the customer liable to pay the enhanced rate. But where, after receiving notice that the rate of interest has been raised, the customer borrows more money from the bank, the bank is justified in charging him interest at the enhanced rate

Gaddar Mal v. The Tata Industrial Bank, Ltd., Bombay, I. L. R., 49 All 674

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 23—*Stifling a criminal prosecution—Compromise—Incidental withdrawal of a petty charge of theft.*] A compromise which is otherwise a fair and reasonable one is not invalidated because in connexion therewith a trifling charge of theft between the servants of the parties has been withdrawn. *Dwijendra Nath Mullick v. Gopi Ram Gobindram*, 20 C. W. N., 855, followed

Onkar Mal v. Ashiq Ali, I. L. R., 49 All 540

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 23—*Agreement opposed to public policy—Performance of "puja" for success of pending suit.*] Plaintiff and defendant entered into a contract by which the plaintiff undertook to perform some kind of "*puja*" (referred to as "*anushthan*") in order to cause defendant to be successful in a suit which he had before the courts; in the event of his success, the plaintiff was to get one-tenth of the decree money. The plaintiff (partially at any rate) carried out his part of the contract, and the defendant was successful in his suit.

Held, on suit to enforce payment of one-tenth of the decree money, that the agreement was contrary to public policy, as it was found that the intention of the parties was that the plaintiff should exercise some extraneous influence, unauthorized by law, on the mind of the court

Bhagwan Dat Shastri v. Raja Ram, I. L. R., 49 All. ... 705

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ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 25(3). *See* Act No. II of 1899, section 61; schedule I, article 5(c) 498

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 30—*Wagering contract—Principal and agent—Suit by principal to recover money deposited with agent as security.*] An agent employed to carry out wagering contracts cannot plead the illegality of such contracts as a defence to an action brought by the principal to recover from the agent money received by him from the principal by way of security for the fulfilment of such contracts. *Shola Nath* v. *Mul Chand*, I. L. R., 25 All., 639, followed. *Chhanga Mal* v. *Sheo Prasad*, I. L. R., 42 All., 419, overruled, and *Dayabhai Tribhovandas* v. *Lakkmichand, Panachand*, I. L. R., 9 Bom., 398, referred to.

Hardeo Das, Nanak Chand v. Ram Prasad, Sheam Sundar, I. L. R., 49 All. 488

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 30—*Principal and agent—Wagering contract—Breach of contract by principal—Liability incurred by agent—Duty of principal to indemnify.*] A person who acts merely as a commission agent for the sale of purchase of goods for future delivery is not debarred from recovering his commission and such incidental expenses as he may have been put to, by reason of the fact that, as between the principals, the transaction may have been of the nature of a wagering contract. *Bulki Chand* v. *Kachchu Mal*, I. L. R., 15 All., 503. *Hardeo Das Nanak Chand* v. *Ram Prasad, Shyam Sundar Lal*, I. L. R., 49 All., 488, and *Sobhagmal Gammal* v. *Mukund Chand Baita*, I. L. R., 51 Bom., 1, referred to.

Daya Ram v. Mark Dhar, I. L. R., 49 All. 926

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 32 AND 37—*Act No. IV of 1882 (Transfer of Property Act), sections 14 and 40—Rule against perpetuities—Covenant running with the land—Contract—Uncertainty—Pre-emption.*] A deed of exchange was executed by *MR* and *N*, in which, in lieu of certain property transferred by *N* to *MR* the latter transferred 7 annas 11 pies in village Gurdih Amrut to *N*, retaining only 1 pie, and it was mutually agreed that if either party should wish to transfer his property in the village he should transfer it to the other, but if either transferred it to a third person, the other party should have a right to pre-empt. *N* having sold his property in the village in question in three separate lots, three suits for pre-emption were brought by the legal representative of *MR*.

Held, that the suit would lie. The agreement upon which it was based was neither void for uncertainty nor offended against the rule against perpetuities, but on the contrary was a perfectly good agreement in law.

Muhammad Jan v. *Fazal-ud-din*, I. L. R., 40 All., 514, referred to. *Gobi Ram* v. *Jeot Ram*, I. L. R., 45 All., 478, and *Balli Singh* v. *Raghubar Singh*, I. L. R., 45 All., 492, overruled.

Aulad Ali v. Afi Athar, I. L. R., 49 All. 527

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 63—*Undertaking by creditor not to take steps to recover debt within a time named—Consideration—Civil Procedure Code, order VI, rule 17—Amendment of plaint.*] *Held*, on a construction of section 63 of the Indian Contract Act, that an undertaking given by a creditor to his debtor not to take steps to recover his debt before the expiry of a certain period is binding on the creditor and a suit brought before the expiry of the period named must be dismissed

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as premature. *Davis v. Candasami Mudali*, I. L. R., 13 Mad., 393, and *N. M. Firm v. Thayarammal Chetty*, I. L. R., 45 Mad., 180, followed.

Jugal Kishore v. Chart and Company, I. L. R., 49 All. 599

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 68—*Guardian and ward—Loan contracted by guardian for benefit of minor—Minor's estate held liable.*] When a loan is taken by a guardian on behalf of a minor for the purpose of some necessity or for the benefit of the minor's estate the minor's estate can be held liable.

Bhawal Sahu v. Baijnath Pertab Narain Singh, I. L. R., 35 Calc., 820, *Krishna Chettiar v. Nagamani Ammal*, I. L. R., 39 Mad., 915, *Subramania Ayyar v. Arumuga Chetty*, I. L. R., 26 Mad., 330, and *Sundararaja Ayyangar v. Pattanathusami Tevar*, I. L. R., 17 Mad., 306, referred to.

Phulram v. Ayub Khan, I. L. R., 49 All. 62

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 140—*Mortgage—Surety for payment of money due under a mortgage—Question of priority between the holder of a subsequent mortgage and a surety who had not discharged the principal's debt in full.*] In the year 1896 one *KA* entered into a collusive arrangement with his wife whereby his immovable property was made over to her in satisfaction of her claim for dower. This arrangement was carried out by means of an arbitration and a decree in accordance with the award. A suit was, however, brought by *LP*, one of *KA*'s creditors, to set aside this decree as a fraud on the creditors, and he obtained a decree in 1897. After this, *KA* and his wife jointly executed three mortgages, the first in favour of *LP*, the second in favour of another creditor *DL* and the third again in favour of *LP*. Whilst these three mortgages were outstanding, one *RB* became surety and paid off most of the money due under the three mortgages, excepting Rs. 12,500 due to *LP* and Rs. 1,500 due to *DL*. As security for these amounts, the widow and sons of *KA*, who had died some years previously, executed another mortgage in 1913.

Held, on suit brought on this last mortgage—(1) that the widow had authority to execute it; *Chennappa v. Puttapa*, I. L. R., 11 Bom., 708, followed; and (2) that, inasmuch as the surety did not pay off the whole of the money that was owing to the creditors, but only part of it, the mortgagees rights under the mortgage of 1913 took priority over her claims

Darbari Lal v. Mahbub Ali Mian, I. L. R., 49 All. ... 640

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTIONS 151 AND 152, *See* Act No. IX of 1890, section 72 861

ACTS—1873—X (INDIAN OATHS ACT), SECTIONS 9 TO 11—*Party agreeing to be bound by the statement of a particular witness—Circumstances in which party may be allowed to resile from agreement.*] A party who has agreed, in accordance with the provisions of the Indian Oaths Act, 1873, to be bound by the statement on oath of a particular person is not in all circumstances irrevocably bound by such agreement. If such party satisfies the court that there is good ground for retracting, the court would probably exercise a wise discretion in refusing to administer the oath. But when a party puts forward frivolous reasons for retracting, the court is justified in administering the oath notwithstanding the retraction. *Thevi Ammal v. Subbarama Mudali*, I. L. R., 22 Mad., 232, followed.

Sukh Ram v. Wali Ahmad, I. L. R., 49 All. ... 388

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ACTS—1873—X (INDIAN OATHS ACT), SECTION 11. *Suit against minor. Agreement by guardian that the suit should be decided according to the statement of a referee.*] In a suit for restitution of conjugal rights brought against a minor under the guardianship of her sister, the parties entered into an agreement that the case should be decided according to the statement made by a certain pleader. The court accepted the agreement and examined the pleader, and decided the suit, on his statement, in favour of the plaintiff.

Held, that the decision so arrived at was a perfectly valid decision and binding on the minor defendant. *Parbhu Dayal* v. *Jamil Ahmad*, I. L. R., 44 All., 117, and *Wasi-uz-zaman Khan* v. *Faiza Bibi*, I. L. R., 38 All., 131, referred to.

Deoraj Misra v. Abhairup, I. L. R., 49 All. 342

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 9. *Suit for possession of immovable property—Suit based on a possessory title brought after six months from dispossession.*] Even independently of section 9 of the Specific Relief Act, 1877, a person who has been ousted by a trespasser from the possession of immovable property to which he had merely a possessory title is not debarred from bringing a suit in ejectment on the basis of his possessory title even after the lapse of six months from the date of dispossession. *Wali Ahmad Khan* v. *Ayodhia Kandu*, I. L. R., 13 All., 537, followed. *Lachman* v. *Shambhu Narain*, I. L. R., 38 All., 174, distinguished.

Ram Dayal v. Saraswati, I. L. R., 49 All ... 191

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 42, *See* Religious endowment 435

ACTS—1878—VII (FOREST ACT), SECTION 31(g). *Forest rules—Construction of rules—"breaking" and "clearing."*] Where "breaking" of ground only was forbidden by rules framed under section 31(g) of the Forest Act, 1878, it was *held* that clearing only, without breaking, was not an offence.

Emperor v. Umed Singh, I. L. R., 49 All. 291

ACTS—1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTIONS 27 AND 82—*Hundi—Renewal of hundi after acceptance—Liability of acceptor on first bill.*] On the 2nd of November, 1921, two hundis were drawn by Tajammul Husain, Bishesbar Nath, in favour of the Punjab National Bank, the drawees being the firm of Moti Lal, Bishesbar Nath of Calcutta, by which they were accepted. On the 4th of February, 1922, these hundis were renewed by the same drawers, but were not accepted by the drawees.

Held, that this renewal did not absolve the drawees from their liability on the original hundis. *Sheikh Akbar* v. *Sheikh Khan*, I. L. R., 7 Calc., 256, *Sridhar Kaar* v. *Chandramati*, I. L. R., 4 All., 330, *Perumalayan Servayi* v. *Ramyalayan*, I. L. R., 26 Mad., 580, and *David Torrance* v. *The Bank of British North America*, I. L. R., 5 App. Cas (P.C.), referred to.

The Punjab National Bank v. Tajammul Husain, Bishesbar Nath I. L. R., 49 All. 227

ACTS—1881—XXVI (NEGOTIABLE INSTRUMENTS ACT), SECTION 46. *See* Act No. 1 of 1872, section 92 464

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 14 AND 40. *See* Act No. IX of 1872, sections 32 and 37 527

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 54. *See* Act (Local) No. XI of 1922 483

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ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 58(c)—*Sale—Mortgage by conditional sale—Sale accompanied by synchronous agreement for re-purchase at the end of a fixed period.*] Three documents were executed by the same parties on the same day. The first purported to be a deed of sale of certain landed property comprising a good many plots of *sir* and *khudkasht* land. The *second* was described as a deed of relinquishment, and by it the vendor proposed to relinquish all his rights in the *sir* and *khudkasht* in favour of the purchaser. The third was an agreement by the purchaser by which he gave the vendor an option of re-purchasing the property which had been sold, at any time after the expiration of seven years from the date of the sale, but with this stipulation that the re-purchase was not to be made by means of funds borrowed for the purpose. The three documents were registered a few days later, but all on the same day. Before this transaction, also, the parties had for some time occupied the relative positions of debtor and creditor.

Held, that the documents above described and the circumstances in which they were executed brought the case within the definition contained in section 58(c) of the Transfer of Property Act, 1882, and the plaintiff was entitled to a decree for redemption.

Narasingeri v. *Punuganti*, I. L. R., 47 Mad., 729, followed. *Balkishen Das* v. *Legge*, I. L. R., 22 All., 149, *Mohabir Man Singh* v. *Maharaj Singh*, I. L. R., 46 All., 72, *Bishambhar Nath* v. *Muhammad Ubaid-ullah Khan*, I. L. R., 46 All., 580, *Muthuvelu Mudeliar* v. *Vythilinga Mudaliar*, I. L. R., 42 Mad., 497, *Sital Parshad* v. *Lachmi Parshad*, I. L. R., 10 Calc., 331, and *Ram Saran Lal* v. *Amrita Kuar*, I. L. R., 3 All., 369, referred to.

The test in such cases is the intention of the parties, which must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. *Jhanda Singh* v. *Wahiduddin*, I. L. R., 38 All., 570, followed.

Mathura Kurmi v. Jagdeo Singh, I. L. R., 49 All. ... 406

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 39—*Act No XXVI of 1917 [Transfer of Property (Validating) Act], section 2—Act No XXVII of 1926 [Transfer of Property (Amendment) Act], section 2—Interpretation of Statutes—Criteria for determining whether Act has retrospective effect or not.*] *Held* (per SULAIMAN, DAWSON-MILLER and LEVE, JJ., WALSH, A. C. J., and MUKERJI, J., dissenting) that the Transfer of Property (Amendment) Act, 1926, is not retrospective in its operation.

Attorney-General v. *Theobald*, 24 C. L. R., 537, *Ngo Hoang* v. *The Queen*, 7 Mor. L. A., 72, *Gardner* v. *Lucas*, 3 App. Cas., 582, *Young* v. *Adams*, [1898] A. C., 469, *Shamu Patter* v. *Abdul Kadir Ravuthan*, I. L. R., 35 Mad., 697, *Main, Modern Railway Co.* v. *Pye*, 30 L. J. C. P., 314, *Muhammad Ibdus Sanad* v. *Qurban Hussain*, I. L. R., 26 All., 119, *Gopal Pande* v. *Parsotam Das*, I. L. R., 6 All., 121, *Pardo* v. *Bingham*, L. R., 4 Ch. App. 735, *Leeds and County Bank* v. *Walker*, 11 Q. B. D., 84, *Nainal Haq* v. *Muhammad Subhan-ullah*, I. L. R., 41 All., 1, and *Colonial Sugar Refining Company* v. *Irving*, [1905] A. C., 369, referred to.

One of the marginal witnesses to a mortgage-deed, executed nine years prior to the passing of the Transfer of Property (Amendment) Act, 1926, was present when the deed was executed, while the other put his signature to the document on receiving a

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personal acknowledgement from the executant. *Held*, that the mortgage was invalid, inasmuch as it was not duly attested as required by the ruling in *Shama Patter* v. *Abdul Kadir*, 35 Mad., 607, and, therefore, a suit based on it must fail.

Girja Nandan Kalwar v. Hanuman Das Marwari, I. L. R., 49 All. 25

ACTS—1882—IV (TRANSFER OF PROPERTY ACT, SECTION 89—*Mortgage—Decree for sale—Satisfaction of decree by third party—Security kept alive.*] Where a mortgage debt, for the payment of which a sale has been ordered, is satisfied by a third party who obtains a security for the advance made by him, such security is not extinguished by section 89 of the Transfer of Property Act and the encumbrance in respect of which the sale was ordered enures for the benefit of the party making the payment: *Bibijan Bibi* v. *Sachi Baksh*, I. L. R., 31 Calc., 863, followed. *Shaun Lal* v. *Rashmud-din* I. L. R., 28 All., 778, *Matru Lal* v. *Durga Kunwar*, I. L. R., 42 All., 464, *Chhajjan Lal* v. *Muhammad Husain Khan*, I. L. R., 11 All., 456, *Sukhi* v. *Ghulam Safdar Khan*, I. L. R., 33 All., 460, *Vanmikalingam Mudali* v. *Chidambara Chetty*, I. L. R., 29 Mad., 37, and *Mel Ram* v. *Shadi Ram*, I. L. R., 40 All., 407, referred to

Abbas Ali Khan v. Chote Lal, I. L. R., 49 All ... 162

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SECTION 10—*Suit cognizable by a Court of Small Causes, but tried by a munsif—Question of jurisdiction raised in appeal.*] An objection to the jurisdiction must be taken notice of by any court, however late it may be raised, if it happens that on the facts admitted or proved it is manifest that there is a defect of jurisdiction. *Ramlal Hargopal* v. *Kishanchand*, I. L. R., 51 Calc., 361, followed.

Municipal Board of Benares v. Shambhu Nath, I. L. R., 49 All. 686

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SECTION 25—*Revision—Decision not according to law, but no substantial injustice.*] There should be no interference by the High Court under section 25 of the Small Cause Courts Act, 1887, unless it clearly appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes. *Muhammad Bakar* v. *Bahai Singh*, I. L. R., 13 All., 277, followed.

Madan Lal v. Lal Chand, I. L. R., 49 All. 457

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SCHEDULE II, ARTICLE 8—*Small Cause Court Jurisdiction—"House rent."*] Held that the term "house-rent" as used in article 8 of the second schedule to the Provincial Small Cause Courts Act, 1887, is not confined to the rent of a dwelling-house, but includes also the rent of a shop. *Babu Lal* v. *Bhawani Das*, 9 A. L. J., 776, and *Nga Kun* v. *Mi Mya*, 4 Indian Cases, 922, followed.

Ahmadi Begam v. Girtaj Kishore, I. L. R., 49 All. ... 134

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SCHEDULE II, ARTICLE 35—*Jurisdiction—Small Cause Court—Suit for return of specific goods.*] On the occasion of the betrothal of two small children (the father of the boy handed over certain ornaments to the girl's family, and it was agreed that, if the marriage was subsequently not carried out when the children reached the age of maturity, the ornaments were to be returned.

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Held, that the suit for the return of the ornaments so handed over was not excluded from the cognizance of a Court of Small Causes.

Chedi Lal *v.* Jawahir Lal, I. L. R., 49 All ... 186

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT), SCHEDULE II, ARTICLE 35(*a*)—*Small Cause Court suit—Suit for compensation for unauthorized felling and removal of a tree—Test for deciding whether a suit is excepted from the provisions of the Act.*] The question whether a suit is or is not one of a Small Cause nature must be decided according to the allegations made by the plaintiff in his plaint. If these allegations make out a case which is excepted, it is immaterial what the defence raised is, or what the actual findings arrived at by the lower courts are.

Article 35(*a*) of the Provincial Small Cause Courts Act covers all suits for compensation for loss occasioned by an offence under chapter XVII of the Penal Code.

Deoki Rai *v.* Harakh Narain Lal, I. L. R., 49 All. ... 85

ACTS—1887—IX (SMALL CAUSE COURTS ACT), SCHEDULE II, ARTICLE 35 (*a*)—*Test of applicability of—Suit for compensation for cutting trees and removing fruit—Bona fide claim of right.*] Article 35 (*a*) of the second schedule of the Small Cause Courts Act applies only to those acts which, by the circumstances of the case, are clearly alleged or shown to be punishable by the Penal Code. Merely removing fruit or cutting trees under a *bona fide* claim of right, or as a result of the dispute, is not necessarily a criminal offence.

Raghubar Dayal *v.* Mulwa, I. L. R., 49 All. ... 440

ACTS—1887—XII (BENGAL, AGRA AND ASSAM CIVIL COURTS ACT), SECTIONS 27 (3) AND 8, *See* Criminal Procedure Code, sections 195(1) (*b*) and (*c*) and 476 792

ACTS—1889—VII (SUCCESSION CERTIFICATE ACT), SECTION 6—*Suit for redemption by legal representative of deceased mortgagor—Succession certificate not produced until after passing of decree.*] Where a succession certificate is necessary, it must be obtained at any rate before the court of first instance is ready to pronounce judgment. It has no retrospective effect, and therefore is of no avail to the plaintiff if it is obtained only when the suit in respect of which it is needed is in the stage of appeal. *Watch Chand* v. *Muhammad Bakhsh*, I. L. R., 16 All., 259, followed.

Kashmeri Das *v.* Mukhlal, I. L. R., 49 All. 1

ACTS—1890—VIII (GUARDIANS AND WARDS ACT), *Guardian and minor—Right of father to custody of minor son.*] A father is not only the natural guardian, but has an indefeasible right to the custody of his minor son, unless there are overwhelming circumstances to the contrary. *In re Thain; Thain* v. *Taylor*, 25 L. J., 202, followed.

Abdul Aziz Khan *v.* Nanhe Khan, I. L. R., 49 All. ... 392

ACTS—1890—VIII (Guardians and Wards Act), sections 12 and 25 ... 773

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTION 47 (*the Rules framed by railway company—Sale of goods consigned to a railway company for transport without waiting for expiry of prescribed time. Illegal conversion.*] Where goods which had been consigned to a railway company for carriage were sold by the company, on account of refusal to take delivery, without waiting for the expiry of the time prescribed by the rules framed under section 47 of the Indian Railways Act, 1890, and without a proper bill for wharfage

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having been presented by the company, it was *held* that the action taken by the company amounted to illegal conversion and the owner of the goods was entitled to damages.

Bengal and North-Western Railway v. Maitu Ram, I. L. R., 49 All. 300

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTION 72—*Railway. Goods in transit destroyed by fire—Extent of liability of railway administration—Act No. IX of* 1872 *(Indian Contract Act), sections* 151 *and* 152.] The liability of a railway company in respect of goods carried by it "at railway risk" is governed by sections 151 and 152 of the Indian Contract Act, 1872. Where such a consignment was destroyed by fire, it was *held* that the railway company had discharged its liability when it had shown that it had done everything that a reasonable and prudent man would have done to protect and endeavour to save his own property. It was not bound to explain and prove the actual origin of the fire and to show that the company was free from any negligence in the matter.

Mukhand, Ram Prasad v. The Great Indian Peninsula Railway, I. L. R., 49 All. 884

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTION 72 (2) (*b*)—*Railway Company—Liability of Company for goods stolen out of a bale whilst in the custody of the company's servants—Construction of document—Risk-note in form "H."*] *Held*, on a construction of the new form of risk-note "H", that the note would not afford any protection to the railway company in a case where a bale or package having been received into the custody of the company's servants properly packed and in good condition, with no sign of having been tampered with, was afterwards found, whilst still in the same custody, to have been opened and sewn up again and part of the contents abstracted. Either, and most probably, the theft had been committed by some of the railway servants themselves, or the railway servants in charge of the goods had allowed some trespasser to have access to them, in which case equally the company would be liable. *Secretary of State for India in Council* v. *U. P. Glass Works*, I. L. R., 48 All., 581, not followed.

Secretary of State for India in Council v. Bhagwan Das, I. L. R., 49 All. 989

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTION 72 (2) (*b*)—*New form of risk-note "H"—Suit for damages for short delivery—Pilferage not pointed out to the servants of the railway administration on or before delivery.*] Plaintiffs sued a railway company for damages on the allegation that one of a number of bales consigned by them had been cut in transit and a portion of its contents abstracted; but there was no allegation that any pilferage from a package or packages had been pointed out to the servants of the railway administration on or before delivery. The claim of the plaintiffs had been notified to the railway company some four months after delivery under section 77 of the Railways Act. *Held*, that the railway administration was not liable under clause (*b*) of the proviso to risk-note form H, and, therefore, the suit must fail. *Secretary of State for India in Council* v. *U. P. Glass Works*, I. L. R., 48 All., 581, referred to.

Kishore Chand, Slab Charan Lal v. B. B. and C. I. Railway, I. L. R., 49 All. 916

ACTS—1890—IX (INDIAN RAILWAYS ACT), SECTIONS 77 AND 80—*Interpretation of statute—Suit against a railway company for compensation for loss of goods—Notice—"Loss"—"Non-delivery."*] On the 26th of January, 1930, plaintiff's agent, at

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Hapur handed over to the Oudh and Rohilkhand Railway certain bags of sugar and wheat for carriage to plaintiff at a place in the Banda district. The consignment did not reach plaintiff until the 29th of October, 1920, when it was discovered to be short by 17 bags. On the 13th of January, 1921, plaintiff gave notice to the Great Indian Peninsula Railway, who had carried the goods for the latter part of the journey, and sued the company for the value of the goods lost, and for the refund of an alleged overcharge that he had been made to pay. The suit was dismissed.

Held, on appeal, that the dismissal was right. Non-delivery includes "loss" as that term is used in section 77 of the Indian Railways Act, 1890, and notice of suit had not been given within time. Nor could a claim for refund of the overcharge be made against the Great Indian Peninsula Railway Company in any case *East Indian Railway Company* v. *Fazal Ilahi*, I. L. R., 47 All., 136, and *Assam Bengal Railway Co., Ltd.* v. *Radhika Mohun*, 72 Indian Cases, 714, followed *Badri Prasad* v. *Great Indian Peninsula Railway*, 22 A. L. J., 897, distinguished.

Shiv Dayal, Niranjan Lal v. Great Indian Peninsula Railway Company, I. L. R., 49 All., ... 236

ACTS.—1894—I [ACQUISITION OF LAND ACT), sections 9 AND 23—*Acquisition of land—Notice to persons interested.*] *Held* on a construction of section 9 of the Land Acquisition Act, 1894, that the rule requiring an interval of fifteen days between the issue of the public notice provided for by clause (2) and the hearing of claims by the Collector does not apply to a personal notice issued under clause (3).

If after notice duly issued under section 9 (2) no claim is made before the Collector and no cause shown for the omission to make a claim, the District Judge on a reference made to him cannot award any larger amount than that awarded by the Collector *Secretary of State for India in Council* v. *Bikhan Dat*, I. L. R., 33 All., 376, and *Narain Dat* v. *The Superintendent of Dehra Dun*, I. L. R., 37 All., 89, referred to.

Birbal v. The Collector of Moradabad, I. L. R., 49 All. 145

ACTS 1891 [CIVIL ACQUISITION ACT), SECTION 18—*Reference based on applications not in compliance with law—Refusal of Judge to entertain reference.*] Where a Collector in a matter under the Land Acquisition Act, 1894, acted upon an application which was not in accordance with the provisions of the Act and did not specify his grounds of reference, and made a reference to the District Judge, it was *held* that the Collector was not competent to waive the requirements of the Act and the District Judge was right in refusing to take action on a reference so made *In the matter of Government* v. *Nana Kalidas*, I. L. R., 20 Bom., 275, and *In re* v. *Secretary of State for India*, I. L. R., 32 Calc., 1205, referred to.

Sukhbir Singh v. Secretary of State for India in Council, I. L. R., 49 All 212

ACTS 1894 [CIVIL ACQUISITION ACT, SECTIONS 31, CLAUSE (2)—*Acquisition of land for a new market in part of old market—Land owner entitled to compensation.*] Held, reversing [illegible] section 24 of the Land Acquisition Act, 1894, [illegible] is exempted [illegible] claim compensation on the ground [illegible] other land of his [illegible]

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market, being likely to be injuriously affected by the opening of a new market close by.

So held by WALSH, A. C. J., and PELLAN, J., DALAL, J., dissenting.

The Collector of Dinagepur v. *Girja Nath Roy*, I. L. R., 25 Calc., 346, Rameshur Singh v. *Secretary of State for India*, I. L. R., 31 Calc., 470, *Guru Das* v. *Secretary of State for India in Council*, 18 C. L. J., 244, *Cowper Essex* v. *The Local Board for Acton*, L. R., 14 A. C., 153, In re *The Stockport Railway Company*, 33 L. J., Q. B., 251, *Metropolitan Board of Works* v. *McCarthy*, L. R., 7 H. L., 243, and *Hopkins* v. *Great Northern Railway Company*, L. R., 2 Q. B. D., 224, referred to.

Secretary of State for India in Council v. Muhammad Ismail Khan, I. L. R., 49 All 353

ACTS—1897—X (GENERAL CLAUSES ACT), *See* Act (Local) No. II of 1901, section 193 (4) 330

ACTS—1899—II (INDIAN STAMP ACT), SECTION 44, SUB-SECTION (3)—*Stamp—Deficiency in stamp discovered in pending suit and made good, but not entered in costs—Suit to recover amount so paid barred.*] In the course of a suit on a mortgage it was discovered that the mortgage sued on was insufficiently stamped. The deficiency was made good by the plaintiff, although the liability was really on the defendant; but the payment so made was not included in the costs of the suit in the decree which was made in the plaintiff's favour.

Held, that the plaintiff could not thereafter sue to recover the amount which he had paid on account of the deficiency in stamp duty from the defendant.

Ram Singh v. Mun Singh, I. L. R., 49 All ... 301

ACTS—1899—II (INDIAN STAMP ACT), SECTION 61; SCHEDULE I, ARTICLE 5(e)—*Act No. IX of 1872 (Indian Contract Act), section 25 (3)—Stamp—Promise to pay a time-barred debt—Acknowledgement of balance of account coupled with admission of rate of interest payable—Agreement.*] On a creditor sending to a debtor a statement of the account between them, the debtor endorsed thereon an admission of the correctness of the balance found, and added "interest at 12 annas per cent. per mensem."

Held, that this was more than a mere acknowledgement of liability but was an agreement not otherwise provided for within the meaning of article 5(e) of the first schedule to the Indian Stamp Act, 1899.

Held, further, that although there was no promise to pay in express words, the memorandum fell within section 25(3) of the Indian Contract Act.

Ganga Prasad v. *Ram Dayal*, I. L. R., 23 All., 502, and *Gobind Das* v. *Sarju Das*, I. L. R., 30 All., 268, distinguished. *Laxmibai* v. *Ganesh Raghunath*, I. L. R., 25 Bom., 373, *Mahadeo Kori* v. *Sheorai*, I. L. R., 41 All., 109, and *Mulchand Lala* v. *Kashiballan Biswas*, I. L. R., 35 Calc., 111, followed.

Prahlad Prasad v. Bhagwan Das, I. L. R., 49 All. ... 496

ACTS—1907—III (PROVINCIAL INSOLVENCY ACT), SECTION 16, SUB-SECTION 2(a) *See* Pre-emption 367

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTIONS 4 AND 19—*Limitation—Acknowledgement made after expiration of three years' period but before suit on promissory note was barred—"The period prescribed."*] An acknowledgement of a debt made after

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the expiration of the three years' period prescribed by schedule I to the Indian Limitation Act, 1908, for a suit on a promissory note, but made before a suit on the note is actually barred by limitation, is a good acknowledgement. *Sheo Partab Singh* v. *Tajammul Hussain*, I. L. R., 49 All., 67, followed. *Bai Hemkore* v. *Masamalli*, I. L. R., 26 Bom., 782, dissented from.

Abdul Ghani v. Chiranji Lal, I. L. R., 49 All. ... 726

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 14—*Limitation—Appeal filed in wrong court owing to* bonâ fide *mistake of appellant.*] An appellant through a *bonâ fide* mistake, probably caused by erroneous advice given to him by his pleader, filed an appeal in a court which had had jurisdiction to entertain it once, but not long previously ceased to have such jurisdiction. As soon as his mistake was pointed out to him he lost no time in presenting his memorandum of appeal to the right court; but by that time the appeal was on the face of it barred by limitation.

Held, that section 14 of the Indian Limitation Act, 1908, applied and the appellant was entitled to exclude the time which he had spent in taking his appeal to the wrong court. *Mauhal Ahmad* v. *Munir*, 14 A. L. J., 212, and *Brij Indar Singh* v. *Kanshi Ram*, 15 A. L. J., 777, followed.

Kishan Lal v. Tika, I. L. R., 49 All. 558

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 19—*Acknowledgement—Suit on a mortgage of joint family property. Acknowledgement of liability contained in a reference to arbitration and an award.*] The managing member of a joint Hindu family executed in 1902 a simple mortgage of some of the joint family property. Thereafter, the members of the family being in doubt as to how the liability under this mortgage should be distributed amongst them agreed to refer the question to arbitration and an award was made setting forth the proportions in which each member of the family was liable. This was in 1910. In 1912 the representatives of the original mortgagee instituted a suit for sale on the mortgage of 1902. *Held*, that the reference to arbitration and the award made thereon amounted to an acknowledgement of liability within the meaning of section 19 of the Indian Limitation Act, 1908, and the suit was not time barred.

An acknowledgement, to take the case out of the statute of limitations, must be either one from which an absolute promise to pay can be inferred or, secondly, an unconditional promise to pay the specific debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed.

Maniram Seth v. *Seth Rupchand*, I. L. R., 33 Calc., 1047, followed. *In re Rivers Steam Company, Mitchell's Claim*, L. R., 6 Ch. App., 822 (824), referred to.

Phul Singh v. Bhagraj, I. L. R., 49 All. 801

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTIONS 19 AND 20—*Limitation—Application for a final decree.*] Although the time for application for a final decree may be extended under either section 19 or section 20 of the Indian Limitation Act, 1908, if the cause for extension alleged is part payment of the decretal debt it is necessary that such payment be attested by some writing by the hand of the person making the payment. *Subbalakshmi Ammal* v. *Ramanujam Chetty*, I. L. R., 42 Mad., 52, referred to.

Baldeo Sahai v. Jafar Hussain, I. L. R., 49 All ... 147

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ACTS—1908—IX (INDIAN LIMITATION ACT), SECTIONS 19 AND 31, SCHEDULE I, ARTICLE 132—*Limitation—Acknowledgement—"Period prescribed for the suit."*] The "period prescribed for the suit" as that expression is used in section 19 of the Indian Limitation Act, 1908, is not limited strictly to the period prescribed by schedule I, but will include, in the case of a suit on a mortgage the extra period of limitation given by section 31 of the Act. An acknowledgement of the mortgage-debt which is otherwise valid will not, therefore, be the less so if it is given after the period prescribed by article 132, provided that it is within the additional period allowed by section 31. *Vasudeva Mudaliar* v. *Srinivasa Pillai*, I. L. R., 30 Mad., 426, referred to. *Bai Hemkore* v. *Masamalli*, I. L. R., 26 Bom., 782, distinguished.

Sheo Partab Singh *v.* Tajammul Hussain, I. L. R., 49 All. 67

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 11. *See* Civil Procedure Code, order XXI, rules 58 to 63 903

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 83—*Limitation—Agreement to pay money to a third party—Cause of action*—Terminus a quo.] If *A* undertakes to pay money to *C* on behalf of *B*, but no time is specified within which the payment is to be made, no cause of action arises against *A* until payment is demanded by either *B* or *C*. If then—*A* having made default in payment—*C* sues *B* and recovers from him, limitation in respect of a suit by *B* against *A* will not begin to run until *B* has been compelled by *C* to pay. *Kedar Nath* v. *Har Govind*, 24 A. L. J., 850, followed. *Rajbuber Rai* v. *Jaij Raj*, I. L. R., 34 All., 429, referred to.

Ram Ratan Lal *v.* Abdul Wahid Khan, I. L. R., 49 All. 608

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 109—*Mesne profits—*Pendente lite *and future mesne profits claimed, but not awarded by decree—Second suit for mesne profits to date of possession—Limitation—*Res judicata—*Civil Procedure Code, section 11.*] The period of limitation cannot be suspended, once it has begun to run, unless that suspension is itself provided for in the Indian Limitation Act.

Dwijendra Narayan Roy v. *Joges Chandra*, 30 C. L. J., 40, *Sarat Kamini Dasi*, v. *Nagendra Nath Pal*, 30 C. W. N., 973, and *Soni Ram* v. *Kanhaiya Lal*, I. L. R., 35 All., 227, referred to. *Bassi Kunwar* v. *Dhum Singh*, I. L. R., 11 All., 47, *Baijnath Sahai* v. *Bamgut Singh*, I. L. R., 28 Calc., 775, *Hem Chandra Chowdhry* v. *Kali Prosanna Bhaduri*, I. L. R., 30 Calc., 1033, and *Nrityamoni Dassi* v. *Lakhan Chandra Sen*, I. L. R., 43 Calc., 660, distinguished.

Plaintiffs in a suit for possession of immovable property claimed mesne profits previous to the suit, also *pendente lite* and future; but the decree which they ultimately obtained did not include *pendente lite* and future mesne profits. Some years later the plaintiffs filed a fresh suit for mesne profits from the date of their previous suit to the date of delivery of possession. *Held* that, although this second suit might not be barred as *res judicata*, the plaintiffs were not entitled to get a decree for mesne profits for more than three years prior to the date of the suit.

Ram Dayal v. *Madan Mohan Lal*, I. L. R., 21 All., 425, *Rani Din* v. *Bhup Singh*, I. L. R., 30 All., 225, *Doraiswami* v. *Subramania*, I. L. R., 41 Mad., 182, *Ramasami Iyer* v. *Srirangaraja Iyengar*, 26 Indian Cases, 622, *Muhammad Ishaq Khan*

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v. *Muhammad Rustam Ali Khan*, I. L. R., 40 All., 292, and *Atmaram Bhaskar* v. *Perasham Bullal*, I. L. R., 44 Bom., 954, referred to.

Ram Charan Sahu v. Mata Prasad, I. L. R., 40 All., ... 505

ACTS—1903—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 127. *See* Hindu law 763

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLE 181—*Limitation—Execution of decree—Application to revive an application for execution.*] Section 15 of the Indian Limitation Act 1908, as now amended, does not prohibit, either expressly or by necessary implication, the making of applications for revival which the courts both before and since the commencement of the Act have treated as competent.

Where the execution of a decree has been suspended through no act or default of the decree-holder, he has a right to ask the court to revive and carry through the execution proceedings which have been suspended. This right can be exercised by means of a proper application to that effect made within three years from the date when the right to make it accrued, that is to say, from the date on which the obstacle to the progress of the execution proceedings was withdrawn. *Qamar-ud-din Ahmad* v. *Jawahir Lal*, I. L. R., 27 All., 334, *Madho Prasad* v. *Draupadi Bibi*, I. L. R., 43 All., 383, and *Balwant Singh* v. *Budh Singh*, I. L. R., 42 All., 564, referred to.

Chhattar Singh v. Kamal Singh, I. L. R., 40 All. ... 276

ACTS—1912—II (CO-OPERATIVE SOCIETIES ACT), SECTION 42 (4) (*a*)—*Co-operative society—Liquidation—Act (Local) No III of 1901 (United Provinces Land Revenue Act), section* 233 (*m*).] Under the provisions of section 42 of the Co-operative Societies Act, 1912, as amended by the United Provinces Co-operative Societies Amendment Act, 1919, the Collector attached certain cattle as being the property of one *Z*, who was indebted to a co-operative bank then in liquidation. Whereupon *A* and *S*, who claimed the cattle as their own, lodged an objection to the attachment, and, when this was dismissed, had the cattle released on the security of one *HL*. *HL* was compelled to pay Rs. 720 on account of *Z*'s debt to the bank. Subsequently *HL* and *A* and *S* filed the present suit against the Secretary of State for India in Council, the Liquidator and *Z*.

Held, that the suit was barred by the provisions of section 233 (*m*) of the United Provinces Land Revenue Act, 1901. *Secretary of State* v. *Mahadeo*, I. L. R., 19 All., 127, followed. *Tulsa Kuar* v. *Jageshar Prasad*, I. L. R., 28 All., 563, referred to.

Abdullah v. The Secretary of State for India in Council, I. L. R., 40 All. 701

ACTS—1912—IV (INDIAN LUNACY ACT), SECTION 62—*Insanity—Application for inquisition—Necessity of medical certificate to support application.*] A person who comes before a court with an application for an inquisition in insanity must support his application with a valid medical certificate of insanity. *Muhammad Yaqub* v. *Nasir Ahmad*, I. L. R., 42 All., 504, followed.

Tawasul Husain v. Abrer Husain, I. L. R., 40 All. ...

ACTS—1913—VII (INDIAN COMPANIES ACT)—*Liquidation—Claim against a company in liquidation based upon a compromise decree—Circumstances in which a liquidator must accept the decree or is entitled to call for proof of the claim.*] Where a judgement has been obtained after a trial of issues by a court,

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where there has been a *bond fide* litigation, the trustee in bankruptcy or the official liquidator, in the case of an insolvent company, will not ordinarily go behind the judgement and try to look into the consideration for the same. But where the judgement has been obtained on confession or compromise, or there are circumstances justifying the trustee in bankruptcy or the official liquidator to doubt the *bona fides* of the judgement, or there are circumstances to show that there has been a miscarriage of justice, it would be open to them to call for fresh proof of the claim. *In re Onslow*, 17 Ch. App. Cas., 373, *In re Van Laun*, 2 K. B., 28, *In re Fraser*, 2 Q. B., 633, *In re Lennox*, 16 Q. B. D., 315, *In re Flatau*, 22 Q. B. D., 83, and *In re Hawkins*, 1 Q. B., 404, referred to.

Union Indian Sugar Mills Co., Ltd. *In re the*——, I. L. R., 49 All 738

ACTS—1913—VII (INDIAN COMPANIES ACT), SECTION 4—*Unregistered association of more than twenty persons—Illegal partnership—Suit for partition.*] No suit will lie for the partition of the assets of an unregistered partnership consisting of more than twenty persons. *Mewa Ram v. Ram Gopal*, I. L. R., 18 All., 235, followed. *Greenberg v. Cooperstein*, [1926] 1 Ch., 657, distinguished.

Madan Lal v. Janki Prasad, I. L. R., 49 All. ... 819

ACTS—1914—VIII (INDIAN MOTOR VEHICLES ACT), SECTION 8—"*Driver*"—*Notice by Magistrate requiring a driver licensed for the United Provinces to produce his licence in court.*] Rule 22 of the rules framed under the Indian Motor Vehicles Act, 1914, does not apply to a person who holds a licence to drive in the United Provinces. To such a person section 8 of the Act applies, and the effect of that section is that, though he may be called upon, when driving, by any police officer to produce his licence, it is not lawful for a Magistrate to issue notice to him to produce his licence in court or at the Magistrate's house.

Emperor v. Sita Ram, I. L. R., 49 All 764

ACTS—1917—XXVI (TRANSFER OF PROPERTY (VALIDITY) ACT), SECTION 2, *See* Act No. IV of 1882, section 59 95

ACTS—1920—V (PROVINCIAL INSOLVENCY ACT), SECTIONS 4 AND 53—*Insolvency—Transfer set aside in proceedings under section 53—Ostensible transferees not objecting in spite of notice—Suit for declaration of title barred.*] In a proceeding held by an insolvency court under section 53 of the Provincial Insolvency Act, 1920, the court decided that certain transfers of their property made by the insolvents, the validity of which was questioned by the receiver, were voidable as against him. The ostensible transferees had notice of this proceeding, but did not appear, so that the decision, so far as they were concerned, was *ex parte*.

Held, that section 4 of the Act barred a suit by the transferees for a declaration of their title to the property in question. *Maharaja Kunwar v. E. V. David*, I. L. R., 46 All., 16, and *Pita Ram v. Jujhar Singh*, I. L. R., 39 All., 697, referred to.

Kaniz Fatima v. Narain Singh, I. L. R., 49 All. ... 71

ACTS—1920—V (PROVINCIAL INSOLVENCY ACT), SECTION 6, CLAUSE (*g*)—*Act of insolvency—Notice by debtor to creditor suspending payment of debts—Official receiver—Position of receiver after termination of insolvency.*] The notice mentioned in section 6, clause (*g*) of the Provincial Insolvency Act may possibly be oral, but it must be a notice in an unambiguous, decisive form, made in a definite form of words to a particular creditor at a definite time, that the debtor has suspended payment of his debts.

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The expression " suspended payment of his debts " means the entire suspension of his whole indebtedness and a general intention to stop payment to everybody.

After an insolvency has come to an end and the title of the official receiver is terminated, the insolvency court has no jurisdiction to start an inquiry into the conduct of the receiver regarding any alleged pecuniary loss suffered by the insolvent.

Nowab Das v. Chandra Lal, I. L. R., 49 All. ... 391

ACTS—1920—V (PROVINCIAL INSOLVENCY ACT), SECTIONS 27, 28, 31 AND 43—*Insolvency—Discharge of insolvent not automatic—Insolvent not exempt from arrest in execution of decree.*] *Held*, that without an order of the Insolvency court an insolvent is not discharged automatically at the end of the period fixed in the order of adjudication for an application for discharge. *Abraham* v. *Sookias*, I. L. R., 51 Calc., 337, referred to.

Held also, that an undischarged insolvent is not exempt from arrest in execution of a decree against him. *Radhay Shiam* v. *Hakim Sayid Mohammad Taqi*, 72 Indian Cases, 911, referred to.

Maharaj Hari Ram v. Sri Krishan Ram, I. L. R., 49 All. 201

ACTS—1920—V (PROVINCIAL INSOLVENCY ACT), SECTION 60—*Insolvency—Sale of insolvent's property by Collector—Civil court not competent to interfere with sale proceedings.*] Where the sale of revenue-paying property of an insolvent has been made over to the Collector under the provisions of section 60 of the Provincial Insolvency Act, 1920, the civil court has no authority of any kind over the Collector in respect of the sale proceedings so entrusted to him.

Girdhari Lal v. Jhaman Lal, I. L. R., 49 All. ... 272

ACTS—1922—XI (INDIAN INCOME-TAX ACT), SECTIONS 3 AND 26—*Effect as regards assessment of income-tax of the conversion of a joint Hindu family carrying on business as such into a registered firm.*] A body of persons constituting a joint Hindu family who had for some years been carrying on business as such in Cawnpore converted themselves into a registered firm, with specified shares of each individual partner.

Held, that for the purposes of the Indian Income-Tax Act, 1922, the registered firm was the " successor " of the joint Hindu family, and that as regards the first assessment after the conversion it was the firm that was liable to pay; but the principles on which the rate and the amount of the tax payable should be calculated were those applicable to the joint Hindu family who had been carrying on the business during the period on the profits of which the assessment was to be based. *In the matter of Begg, Sutherland & Co., Ltd.*, I. L. R., 47 All., 715 followed.

In the matter of the firm Nihal Chand, Bishan Lal, I. L. R., 49 All. 611

ACTS—1922—XI (INCOME-TAX ACT), SECTIONS 64(3) AND 66—*"Principal place of business"—Dispute between assessee and income-tax authorities—Assessment made in face of assessee's request for a case to be stated—Rule issued by High Court directing Income-Tax Commissioner to state a case.*] Three firms, viz., Dina Nath Hem Raj of Calcutta, Diwan Chand and Sons of Lahore and Narain Das of Cawnpore, entered into a partnership for the special purpose of carrying out a contract entered

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into by Dina Nath Hem Raj with the East Indian Railway Company for the supply of castor-oil seeds at Manauri on the East Indian Railway. The three firms were interested to the extent of 8 annas, 4 annas and 4 annas, respectively; but the Calcutta firm was evidently the originator, financier and head of the combine. The contract was made in Calcutta, and payments received were made to an account kept in Calcutta; but, as the delivery of the seed had to be at Manauri, most of the purchases and other dealings took place at Cawnpore, and some of the accounts relating to the contract were kept there. The dealings of the partnership lasted for about a year, and it then broke up. The question thereafter arose whether income-tax on the profits derived from this contract was to be assessed at Cawnpore or Calcutta. The Income-Tax Officer of Cawnpore, in spite of the firm's objection, assessed the firm there. They appealed, but their appeal was dismissed. They next applied to the Commissioner of Income-Tax to state a case under section 66 of the Income-Tax Act, 1922, but the Commissioner refused to do so. They next applied to the High Court for a rule directing the Commissioner to state a case. This they obtained, and a case was accordingly stated

On the case so stated, *held*—

(1) that if the question as to the place of assessment had been decided in accordance with section 64(3) of the Act the High Court could not have interfered, but as in the circumstances of this case there was a total failure of the income-tax authorities to apply the provisions of section 64(3), and an illegal assumption of authority by the Income-Tax Officer of Cawnpore, the assessee had a right to have a case stated, and the issuing of the rule was within the jurisdiction of the High Court;

(2) that the facts found afforded no evidence that the principal place of business of the firm was at Cawnpore, but, on the contrary, fully supported the contention that the firm's principal place of business was at Calcutta;

(3) that the Income-Tax Officer of Cawnpore had no right to make a summary assessment whilst a *bona fide* dispute as to the place of assessment was going on, and it was his duty to apply to the superior income-tax authorities under section 64 (3) of the Act for a decision as to the place of assessment; and section 64(4) could not justify the assessment.

In the matter of Dina Nath Hem Raj, I. L. R., 49 All. 618

ACTS—1926—XXVII [TRANSFER OF PROPERTY (AMENDMENT) ACT], SECTION 2, *See* Act No. IV of 1882, section 59 85

ACTS—1927—II [INDIAN REGISTRATION (AMENDMENT) ACT], SECTION 2 *Registration—Written contract for sale containing acknowledgement of receipt of part consideration or earnest money.*] A contract for the sale of immovable property which contains an acknowledgement of the receipt of part consideration or earnest money does not require registration.

Dayal Singh v. *Indar Singh*, 24 A. L. J., 607, referred to.

Pansi Dhar v. Sampat Kumar Singh, I. L. R., 49 All. .. 806

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 20, 21, 21 AND 25—*Occupancy holding—Transfer—Sub-lease.*] Plaintiffs, who were occupancy tenants, were in debt to their landlord both in respect of arrears of rent of their holding and otherwise. They, therefore, executed a document granting to the defendant a right to hold their occupancy holding for five years in consideration

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of his undertaking to pay the arrears of rent and also the future rent as it became due. The defendant did not pay according to his agreement, and the landlord thereupon ejected the plaintiffs.

Held, on suit by the plaintiffs to recover damages from the defendant for non-fulfilment of his agreement, that the agreement in question was not a sub-lease, but a transfer, and as such was forbidden by the provisions of the Agra Tenancy Act, 1901, and the plaintiffs could not sue on it. *Nidha Sah* v. *Murli Dhar*, I. L. R., 25 All., 115, referred to.

Bhawani v. Mangali Singh, I. L. R., 49 All. 826

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 194 *(k)*—"*Standing timber*"—*Fruit trees not included in the term—Act No. X of* 1897 (*General Clauses Act*)—*Applicability of*.] Fruit trees are not included in the term "timber" or "standing timber," and, therefore, cannot be sold by an officer who is authorized to sell movable property only.

Sarju Singh v. Bijai Bahadur Singh, I. L. R., 49 All. ... 980

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 194—*Suit by one of several co-sharers against a tenant for the whole of the tenant's rent—Co-sharer not agent for the others and no special agreement*—Res judicata.] One of several co-sharers cannot sue for the whole rent due to all the co-sharers by the tenants of a holding owned by them all, unless he is an agent appointed by the entire body of co-sharers.

The fact that the defendants may not in previous suits have raised the plea that the plaintiff was not entitled to sue alone does not, by application of the principle of *res judicata*, give him a right to sue alone.

Manohar Lal v. Baldeo Singh, I. L. R., 49 All. ... 918

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 199 (3)—*Act* (LOCAL) *No. III of* 1901 (*Land Revenue Act*), *section* 111, *clause* (1)—Res judicata—*Decree of revenue court—Conflicting decisions—Later prevails*.] A decision of a revenue court, under section 199 (3) of the Agra Tenancy Act, operates as a decision by a civil court for the purpose of *res judicata*. *Thakur Hanwant Singh* v. *Jhamola Kunwar*, 20 A. L. J., 340, and *Baru Mal* v. *Sunder Lal*, 21 A. L. J., 339, followed.

In a case where two decrees operate as *res judicata*, one as against the plaintiff and the other as against the defendant, the later decree must prevail over the former because it shuts out consideration of the former *Damdar Singh* v. *Munawwar Ali Khan*, I. L. R., 37 All., 531, followed.

Amar Singh v. Gobind Ram, I. L. R., 49 All. ... 606

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 111—*Partition—Question of title—Compromise of doubtful rights—Writing—Registration*. The jurisdiction of the civil court to inquire into a claim of title as regards properties which are the subject-matter of a partition in the revenue court arises only under section 111 of the Land Revenue Act. When no suit has been instituted within the time allowed by that section and in compliance with it, the civil court cannot go on with the inquiry.

Under section 111 of the Land Revenue Act, the partition court has power either to decide the question of title itself or direct any party to the case to institute a suit within three months in the civil court for the determination of the question raised. If the party ordered to file a suit within three months

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fails to do so, under subclause (2) of that section the Collector must decide the question against him, and if the suit is instituted, the partition court acts in accordance with the decision of the civil court.

Under no law as a compromise or a mutual settlement between parties required to be reduced into writing, and when no writing is absolutely necessary, registration is not compulsory.

Niranu Singh *v.* Bari Bitta, I. L. R., 49 All. ... 873

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 147—*Citation—Failure to attend in accordance therewith—Act No. XLV of* 1860 *(Indian Penal Code), section* 174.] The issue of a citation to an alleged defaulter under section 147 of the United Provinces Land Revenue Act, 1901, does not involve him in any legal liability to attend, and non-compliance with it does not render him guilty of an offence under section 174 of the Indian Penal Code.

Emperor *v.* Bhirgu Singh, I. L. R., 49 All ... 205

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 147—*Citation—Act No. XLV of* 1860 *(Indian Penal Code), section* 174.] *Held*, that a defaulter to whom a citation has been issued under section 147 of the United Provinces Land Revenue Act, 1901, does not render himself liable to prosecution under section 174 of the Indian Penal Code if he fails to appear in obedience thereto. *Emperor v. Bhirgu Singh*, I. L. R., 49 All., 205, followed. *Ram Bali Singh v. King Emperor*, 19 Oudh Cases, 55, referred to.

Emperor *v.* Bhawani Lal, I. L. R., 49 All. ... 215

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 111, CLAUSE (1). *See* Act (Local) No. II of 1901, *section* 199(3) 606

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 233 (*a*). *See* Act No. II of 1912, section 43 (4) (*a*) ... 701

ACTS (LOCAL)—1903—II (BUNDELKHAND LAND ALIENATION ACT), SECTION 3—"*Brahmans*" *and* "*Brahma Bhats*" *Execution of decree—Objection raised after record sent to Collector to carry out sale.*] *Held*, (1) that "Brahma Bhats" are "Brahmans" within the purview of the Bundelkhand Land Alienation Act, 1903, and (2) that an objection that property is not, under the terms of the Act, saleable in execution of a decree, can be taken at any time up to the actual sale.

Ram Prasad *v.* Gore Lal, I. L. R., 49 All. 887

ACTS (LOCAL)—1903—II (BUNDELKHAND ALIENATION OF LAND ACT), SECTIONS 9 AND 16—*Mortgage—Simple mortgage between members of same agricultural tribe—Validity of mortgage—Remedy of mortgagee.*] A simple mortgage of land to which the Bundelkhand Alienation of Land Act, 1903, applies is not illegal if made between members of the same agricultural tribe, although, by reason of section 16 of the Act the security cannot be sold.

So held by WALSH and DANIELS, JJ., BOYS, J., dissenting.

Bishnath v. *Bharosa*, Miscellaneous Case No. 684 of 1925, decided on the 26th of November, 1925, *Jaswant Rao* v. *Kushinath Rao*, A. I. R., All., 263; 86 Indian Cases, 208, and *Bishnath Singh* v. *Baldeo Singh*, I. L. R., 48 All., 67, referred to.

Ram Sahai Singh *v.* Debi Din, I. L. R., 49 All. ... 8

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ACTS (LOCAL)—1916—II (UNITED PROVINCES MUNICIPALITIES ACT), SECTIONS 337 AND 344—*Notified Area Committee—Authority for prosecution by—Daily fine.*] One Rasain having disobeyed an order of a Notified Area Committee for the demolition of a certain building, the Committee passed a resolution that he should be prosecuted, and a copy of this resolution was sent by the President to the District Magistrate.

Held, that this was a sufficient authority for the prosecution within the meaning of section 344 of the United Provinces Municipalities Act, 1916.

Held also, that in cases where an accused person may incur a daily fine for continued disobedience to an order, it is not competent to the court to fix the amount of such fine in advance. *Emperor* v. *Kashmiri Lal*, I. L. R., 43 All., 644, and *Emperor* v. *Amir Hasan Khan*, I. L. R., 40 All., 509, followed.

Hussain v. Notified Area of Mehoba, I. L. R., 49 All ... 245

ACTS (LOCAL)—1922—VI (UNITED PROVINCES VILLAGE PANCHAYATS ACT). *See* Criminal Procedure Code, section 526 186

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 5—*Pre-emption—Wajib-ul-arz—Custom.*] The wajib-ul-arz of a village contained the following provision on the subject of pre-emption :—"Up to the present time there has been no case of pre-emption in this village, but in the surrounding villages there is a custom of pre-emption by which, when one co-sharer wishes to sell his land, pre-emption is to be allowed in favour of [Here follows the scheme of pre-emption.]"

Held with reference to section 5(1) of the Agra Pre-emption Act, 1922, that a right of pre-emption was necessarily implied as existing in the village in question.

Sharo Lal v. Dwarka Prasad, I. L. R., 49 All. ... 139

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 12—*Pre-emption—"petty proprietary interest"—Isolated plots in a village.*] A separate plot of land in a village is not necessarily a "petty proprietary interest" within the meaning of section 12 of the Agra Pre-emption Act, 1922.

Semble that the right of pre-emption in respect of a "petty proprietary interest" is not confined to co-parceners in the same interest.

Lachman Prasad v. Faiz-ul-Hasan, I. L. R., 49 All. ... 141

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 12, SUB-SECTION (3)—*Pre-emption—Right based on relationship—Method of computation.*] *Held*, on a construction of sub-section (3) of section 12 of the Agra Pre-emption Act, 1922, that a person who claims pre-emption by virtue of propinquity must not be more than four degrees removed from the ancestor common to himself and the vendor, counting that ancestor as the first degree. The measure of four degrees could not, on the language of sub-section (3), be applied to the relationship existing between the pre-emptor and the vendor.

Jadunandan Rai v. Bindeshri Rai, I. L. R., 49 All. ... 655

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 17, SUB-SECTIONS (1) AND (2)—*"Finds"—Pre-emption—Question as to determination of price when disputed.*] The word "finds" as used in sub-section (1) of section 17 of the Agra Pre-emption Act, does not mean that the court must come to a definite conclusion that the ostensible price was not the actual price, but the meaning

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is that some evidence must be given by the plaintiff in order to raise a presumption that the ostensible price was not the price actually paid. A presumption of this kind having been raised, the burden of proof then shifts to the vendee and he has to satisfy the court that the price shown in the deed was the price actually paid by him and if he fails to do so, then all the court can do is to enter into the evidence regarding the market-value of the property and pass a decree for pre-emption on payment of the market-value so found.

Abdul Ghafur v. Kamal-ud-din, I. L. R., 49 All. ... 689

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTION 19—*Pre-emption—Effect of acquisition of an interest in the mahal by the defendant vendee pending the suit.*] Under the Agra Pre-emption Act, 1922, the right of a plaintiff pre emptor may be defeated by the acquisition by the defendant vendee at any time before decree, by means of gift, of an interest in the mahal in which the property in suit is situated. *Qudrat-un-nissa Bibi* v. *Abdul Rashid*, I. L. R., 48 All., 616, followed.

Ram Khelawan v. Banke Behari, I. L. R., 49 All. ... 968

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT), SECTIONS 19 AND 20—*Sale-deed executed by Hindu widow and reversioner—Suit for pre-emption by co-sharer—Subsequent gift by widow—"Indefeasible title."*] A Hindu widow joined with the nearest reversioner for the time being in executing a sale-deed of certain property belonging to her deceased husband's estate. Whereupon a suit was brought to pre-empt the sale. Pending this suit, the widow alone, without the concurrence of the reversioner, executed a gift of the property in question. The plaintiff then filed a second suit, based on this second transaction, on the allegation that it was in reality a sale and not a gift.

Held, that the second suit would not lie, as the gift was not pre-emptible; but that the first suit must be decreed, inasmuch as the gift by the widow did not confer an "indefeasible" interest within the meaning of section 20 of the Agra Pre-emption Act, 1922. *Naurang Rai* v. *Ram Sumer Rai*, A. I. R., All., 660, referred to.

Deo Narain Singh v. Ajudhia Prasad, I. L. R., 49 All. 696

ACTS (LOCAL)—1922—XI (AGRA PRE-EMPTION ACT)—*Act No. IV of 1882 (Transfer of Property Act), section 54—Sale—Pre-emption—Transfer of a right which has to be established by litigation—Sale consideration being an unascertained sum to be spent as costs of a future suit.*] A Hindu widow, in possession as such of her late husband's property sold the same. On the death of the widow the nearest reversioner, not having enough money to sue for the recovery of the property, sold his interest in a portion of it, the consideration being that the vendee undertook to pay the costs of a joint suit to recover the property from the hands of the widow's transferee. A suit was brought, but was compromised: the widow's transferee retained a portion of the property, whilst the reversioner and his vendee got the rest. A suit was then filed to pre-empt the sale by the reversioner.

Held, that under the provisions of the Agra Pre-emption Act, 1922, no suit would lie to pre-empt such a sale. *Abdul Wahid Khan* v. *Shaluka Bibi*, I. L. R., 21 Calc., 406, referred to.

Kalyan v. Desrani, I. L. R., 49 All. 489

ACTS (LOCAL)—1923—I (UNITED PROVINCES PUBLIC GAMBLING (AMENDMENT) ACT), SECTION 2—"*Common gaming house*"—*Criminal Procedure Code, section 264—Summary trial—Notes of*

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evidence destroyed by magistrate.] On a question whether a certain house was or was not a "common gaming house" it was *held*, (1) that papers which formed the record of "*satta*" transactions were "instruments of gaming"; (2) that it was not necessary to prove that "the bank" was bound to win—the mere expectation of profit was sufficient, and (3) that in a case falling within the first definition of "common gaming house" in the United Provinces Gambling (Amendment) Act, 1925, it was not necessary to show that gambling was carried on "for the profit or gain" of the owner. *Emperor* v. *Atma Ram*, I. L. R., 49 All., 261, followed.

Held also that in cases to which sections 263 and 264 of the Code of Criminal Procedure apply, the magistrate is perfectly free to take such notes as he pleases: the notes that he may take are his private property which he can dispose of as he likes. *Emperor* v. *Mantu Tiwari*, I. L. R., 46 All., 447, followed. *Satish Chandra Mitra* v. *Manmatha Nath Mitra*, I. L. R., 48 Calc., 250, dissented from.

Emperor v. Ismail, I. L. R., 49 All. 582

ACTS (LOCAL)—1926—III (AGRA TENANCY ACT), SECTION 254—*Reference to High Court by Board of Revenue—Reference not to be on an abstract point, but of a concrete case arising before the Board.*] Section 254 of the Agra Tenancy Act, 1926, does not contemplate the reference to the High Court of merely an abstract point of law, but the reference of a concrete case coming before the Board of Revenue in which the particular point upon which the Board desires to have the opinion of the High Court arises.

Raja Sri Krishna Dutt Deb Bahadur v. Ram Achhaibar Rai, I. L. R., 49 All. 711

ADMISSION, *See* Pre-emption 219

ADOPTION, *See* Hindu law 502, 579

ADVERSE POSSESSION, *See* Hindu law 713, 768

AGREEMENT, *See* Act No. II of 1899, section 61; schedule I, article 5(c) 496

AGRICULTURAL TRIBE, *See* Act (Local) No. II of 1903, sections 9 and 16 8

"AGRICULTURAL TRIBE", *See* Act (Local) No. II of 1903, section 3 ... 937

ALLUVION, *See* Bengal Regulation No. XI of 1825, section 4 ... 938

ALLUVION AND DILUVION, *See* Bengal Regulation No. XI of 1825 ... 195

"ANTECEDENT DEBT", *See* Hindu law 123

APPEAL, *See* Act No. I of 1872, section 90 85

APPEAL, *See* Act No. IX of 1908, section 14 555

APPEAL, *See* Civil Procedure Code, section 115; schedule II, paragraphs 15 and 16 (2) 812

APPEAL, *See* Civil Procedure Code, order XXII, rules 2 and 3 ... 756

APPEAL, *See* Civil Procedure Code, schedule II, paragraph 16 clause (1) 173

APPEAL, *See* Criminal Procedure Code, section 297 ... 299

APPEAL, New ground of——, *See* mortgage 909

APPELLATE COURT, Powers of, to alter conviction, *See* Criminal Procedure Code, sections 423, 237 and 238 126

ARBITRATION, *See* Act No. IX of 1908, section 11 801

ARBITRATION, *See* Civil Procedure Code, section 115; schedule II, paragraphs 15 and 16 (2) 813

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ARBITRATION. *See* Civil Procedure Code, schedule II, paragraph 16, clause (1) 178

ATTACHMENT. *See* Civil Procedure Code, order XXI, rules 58 to 63 ... 903

AWARD. *See* Civil Procedure Code, schedule II, paragraph 16, clause (1) 178

BAIL. *See* Criminal Procedure Code, section 561A ... 247, 254

BAIL-BOND. *See* Criminal Procedure Code, section 499 825

BANKER AND CUSTOMER. *See* Act No. IX of 1872, sections 7, 8 and 9 674

BANKER AND CUSTOMER. *See* Company 876

BENGAL REGULATIONS—1825—XI (ARREARS AND DILUVION), SECTION 4—*Land taken away gradually and restored suddenly—Custom of dhardhura absent.*] Where no custom of *dhardhura* is proved to exist, land which is taken away by the river gradually, but restored suddenly, if it is capable of identification, will still remain the property of its original owner.

Sri Thakurji v. Jaikali Kunwar, I. L. R., 49 All. ... 328

BOARD OF REVENUE. *See* Act (Local) No. III of 1926, section 254 ... 711

BRAHMA BOATS. *See* Act (Local) No. II of 1903, section 8 ... 887

BRITISH-INDIAN COURTS. *See* Jurisdiction 609

BURDEN OF PROOF. *See* Act No. I of 1872, section 106 589

BURDEN OF PROOF. *See* Criminal Procedure Code, sections 233A to 236 856

BURDEN OF PROOF. *See* Hindu law 779

CAUSE OF ACTION. *See* Act No. IX of 1908, schedule I, article 81 ... 193

CHARGE. *See* Criminal Procedure Code, sections 234 and 235 ... 312

CITATION. *See* Act (Local) No. III of 1901, section 147 ... 205, 215

CIVIL PROCEDURE CODE, SECTION 2(2)—*Preliminary decree passed ex parte—Notice to other side necessary before final decree.*] Where the preliminary decree in a suit has been passed *ex parte*, notice ought to be issued to the other side before the final decree is passed.

Ram Chandra Bhagat v. Lalman, I. L. R., 49 All. ... 396

CIVIL PROCEDURE CODE, SECTION 2(2) AND SECTION 52(2)—*Suit by creditor of deceased against legal representative—Necessity for allegation that defendant is in possession of assets of deceased—Payment of debts by legal representative—Right of preference and retainer.*] In a suit on a bond against the widow and sons of the deceased executant, the widow defended the suit and pleaded that her dower debt was Rs. 25,000 and that the remaining heirs of her husband had sold his property to her in lieu thereof. The trial court found that no dower debt had been proved, and decreed the suit, and the lower appellate court found that no dower debt of a specific amount had been proved, and dismissed the appeal.

Held, on second appeal that the suit was rightly decreed.

Per MUKERJI, J.,—because a decree could be had against the legal representatives of a deceased debtor whether they had any assets of the deceased in their hands or not. How the decree, when obtained, was to be executed was a matter to be ascertained thereafter. *Girdharilal Krishnaballabh* v. *Bai Shiv*, I. L. R., 8 Bom., 809, and *Lalla Bhagwan* v. *Tribhuvan Moltram*, I. L. R., 19 Bom., 653, referred to.

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Ber ASHWORTH, J.,—because although when a defendant is sued in a representative capacity it is open to him to prove that he had fully administered the estate and there were no assets left to proceed against, and in the course of administration, as was alleged in the present case, it was open to him to give preference to his own debt, and, therefore, the existence of a decree debt and its amount and its satisfaction in the manner pleaded were material questions for decision, yet as the lower appellate court had found that the specific amount of the decree had not been proved, the appeal must be dismissed. *Seth Kastur Chand* v. *Mangal Sen*, Punjab Record, 1895, 237, *Haji Saboo Sahick* v. *Ally Mahommed*, 6 Bom., L. R., 1135, *Veerasokkarow* v. *Popiah*, I L. R., 26 Mad., 792, and *Oreshaw* v. *Clapp*, 2 E. and Ad., 309, referred to.

Tamiz Bano v. Nand Kishore, I. L. R., 49 All. ... 645

CIVIL PROCEDURE CODE, SECTION 11—Res judicata—*Wrong decision on a point of law—Pecuniary jurisdiction—Bearing of the question of pecuniary jurisdiction on the application of the doctrine of* res judicata.] It is not a correct proposition of law that the pecuniary jurisdiction of the trial court has no bearing on the application of the principle of *res judicata*: where the pecuniary jurisdiction of the court which tried the first suit was not sufficient to enable it to try the second, the principle of *res judicata* will not apply.

Shahzade Singh v. *Mohammad Mehdi Ali Khan*, I. L. R., 32 All., 8, and *Sheikh Hassu* v. *Ram Kumar Singh*, I. L. R., 16 All 183, referred to.

An erroneous decision on an issue of law can be the basis of a plea of *res judicata*. *Hanmathamal* v. *Narayanamma Aiyar*, I. L. R., 36 Mad., 463, dissented from.

Hub Lal v. Gulzari Lal, I. L. R., 49 All. ... 643

CIVIL PROCEDURE CODE, SECTION 11; ORDER IX, RULE 3, ORDER XXXIV, RULE 5—*Application for final decree on a mortgage suit dismissed without fixing date for hearing of suit—Fresh application filed within time—Res judicata.*] Six months' time was fixed for payment in two suits for sale on mortgages in which the preliminary decrees were affirmed by the High Court in May 1921. On the 7th of August, 1923, two applications for final decrees were made, and, as these did not contain a complete list of the mortgaged property and the interest shown was wrongly calculated, time was allowed to the decree-holders to cure the defect twice, and, ultimately, the applications were dismissed on the 15th of September, 1923, in the absence of the applicants and their counsel. Subsequently, within thirty days of this dismissal, the decree-holders filed fresh applications for final decrees without referring to the previous dismissal. The judgement-debtors' objections, that these applications were barred by limitation, were disallowed by the Subordinate Judge who eventually ordered preparation of the final decrees. *Held*, on appeal, that the applications were not barred either by the rule of *res judicata* or by reason of order IX, rule 3, of the Code of Civil Procedure.

Lachmi Narain Marwari v. *Balmukund Marwari*, I. L. R., 4 Pat., 51, followed. *Ahmad Khan* v. *Gaura*, 16 A. L. J., 148, referred to.

Further, that under order XXXIV, rule 5, it was not incumbent on the decree-holders to furnish a fresh list of the mortgaged property and their applications could not be dismissed

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on the ground that the interest was wrongly calculated. *Jodha Singh* v *Gokaran Das Pande*, I. L. R., 47 All., 546, followed.

Chandra Shekhar v. Amir Begam, I. L. R., 49 All. ... 592

CIVIL PROCEDURE CODE, SECTION 11, *See* Act No IX of 1908, schedule I, article 100 585

CIVIL PROCEDURE CODE, SECTION 11, *See* Mortgage 658

CIVIL PROCEDURE CODE, SECTION 24—*Transfer—Criminal Procedure Code, section 455—"Proceeding."*] Section 24 of the Code of Civil Procedure cannot be invoked to allow a court other than the court, in the course of proceedings in which a perjury or forgery was committed, or a court to which appeals ordinarily lie from that court, to entertain the question of preferring a criminal complaint. The word "proceeding" as used in section 24 of the Code of Civil Procedure can be construed to cover all proceedings contemplated at the date when the Code of Civil Procedure was passed but not a special proceeding not then in contemplation but established by a subsequent Act, namely, the Criminal Procedure Amendment Act, 1923. *Bai vari Lal* v. *Jhumka*, 24 A. L. J., 217, referred to.

Rajdhari Lal v. Rameshar Lal, I. L. R., 49 All. ... 460

CIVIL PROCEDURE CODE, SECTION 47; ORDER XXI, RULE 100—*Suit on mortgage—Party defendant exempted—Purchase of property by plaintiff after decree—Remedy of exempted defendant who claims title to the property.*] *S* obtained a decree for declaration of title to, and possession of, certain property against *R* and others in it. *R* subsequently mortgaged half of the property to *H*, who brought a suit for sale on his mortgage, impleading *S* as a defendant. *S* pleaded that the property in suit belonged to her when the plaintiff's mortgage was executed. The court exempted *S* from the suit, and gave the plaintiff a decree against *R*. Delivery of possession was made by the court amin, and *H* obtained mutation of names. *S* then applied for possession under order XXI, rule 100, of the Code of Civil Procedure, but her application was disallowed. She then brought a regular suit claiming either a declaration of title or possession.

Held, that section 47 of the Code of Civil Procedure was no bar to the suit. *Data Din* v. *Nanku*, 16 A. L. J., 782, distinguished.

Shibbi v. Hardhian Singh, I. L. R., 49 All. ... 370

CIVIL PROCEDURE CODE, SECTION 48—*Execution of decree—Limitation—Application for revival of execution proceedings—"Fresh application."*] The holders of a decree for sale, which was made final on September 28, 1912, applied for execution (the second application) on December 22, 1915. Pending this application, the parties came to a compromise and agreed that the decree should be payable by instalments. Three instalments were paid, and then the judgement-debtors made default. A third application for execution was made, but without result. The fourth application was made on October 22, 1928, and execution of the decree was transferred to the Collector. Meanwhile the original judgement-debtor's interest in the property had been sold in execution of a simple money decree and one *RB* became the purchaser. He paid Rs. 1,000 to the decree-holders and asked for a year's time to enable him to pay the balance. The Collector gave three months' time and finding it unnecessary to keep the case pending in his court returned the decree and the papers to the civil court. After the expiry of the three months granted by the Collector, the decree-holders again applied asking that the "papers

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of the former application" might be sent to the Collector for execution. This was on January 28, 1925. This application was granted on February 6, 1925. Shortly after this the principal decree-holder, Ram Lal, died, and his sons applied on April 28, 1925, praying that they might be brought on the record in place of their late father and that the execution might be proceeded with.

Held, on objection taken by the judgement-debtor, that there was no bar to execution being proceeded with on this application. *Jurawan Pasi* v. *Mahabir Dhar Dube*, I. L. R., 40 All., 198, and *D. S Apte* v. *Tirmal Hanmant Sarnar*, I. L. R., 49 Bom., 695, referred to. *Chhattar Singh* v *Kamal Singh*, I. L. R., 49 All., 276, followed.

Baij Nath v. Ram Bharos, I. L. R., 49 All. 509

CIVIL PROCEDURE CODE, SECTION 73 AND ORDER XXXIV, RULE 13—*Mortgage—Sale in execution—Surplus proceeds made over to mortgagee in part satisfaction of other mortgages not in suit, and without consent of mortgagor—Suit by mortgagor to recover money withdrawn by mortgagee.*] Plaintiff, on different dates, executed three mortgages in favour of defendant Defendant sued on the first, without mentioning the other two, and obtained a decree The mortgaged property, being brought to sale, realized a sum considerably in excess of what was due to the decree-holder. The decree-holder then applied to the court for permission to withdraw the surplus sale-proceeds and apply them to the satisfaction of his other mortgages, and he obtained an order and withdrew the money. *Held*, on suit by the mortgagor for refund of the money so withdrawn, that neither section 73 nor order XXXIV, rule 13, of the Code of Civil Procedure applied: the execution court was not justified in passing the order which it did, and the plaintiff was entitled to the decree claimed. *Ram Narain* v. *Umrao Singh*, I. L. R., 29 All., 615, followed.

Lachmi Narain Achari v Mittha Bhagat, I. L. R., 49 All. 636

CIVIL PROCEDURE CODE, SECTION 92. *See* Religious endowment ... 495

CIVIL PROCEDURE CODE, SECTION 115—*Revision—Erroneous decision on point of limitation*—"*Jurisdiction.*"] It is no ground for revision under section 115 of the Code of Civil Procedure that the court whose order it is sought to revise may have come to an erroneous decision on a point of limitation. *Sarwan Lal* v. *Khuhan*, I. L. R., 17 All., 422, and *Sarwan Lal* v. *Khuhan*, I. L. R., 16 All., 476, followed.

Babu Ram v. Munna Lal, I. L. R., 49 All ... 454

CIVIL PROCEDURE CODE, SECTION 115; ORDER XXIII, RULE 1—*Order by appellate court permitting withdrawal of suit—Reasons not stated—Revision.*] Except on cogent grounds permission should not be given by an appellate court to a plaintiff appellant to withdraw from his suit with liberty to institute a fresh suit, and whenever such permission is granted the court must state its reasons, in order to enable the High Court, when necessary, to judge whether the lower court exercised a judicial discretion in giving the permission

Baij Nath Pande v. Babban Pande, I. L. R., 49 All. ... 459

CIVIL PROCEDURE CODE, SECTION 115; SCHEDULE II, PARAGRAPHS 15 AND 16(2)—*Arbitration. Reference made without consent of all the parties—Decree based on consequent award Appeal—Revision.*] A reference to arbitration made by a court upon an application in which all the parties to the suit have not joined as a reference

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made without jurisdiction and is liable to be set aside in the exercise of the High Court's revisional jurisdiction.

Held by Ashworth, J., that when in such a case a decree has been passed on the award no appeal will lie except in so far as it is in excess of or not in accordance with the award.

Gopal Das v. *Bajj Nath*, I. L. R., 48 All., 240, *Turab Ram* v. *Bandhu*, 21 A. L. J., 705, and *Sahdeo Singh* v. *Medha Singh*, I. L. R., 49 All., 178, referred to.

Tej Singh v. Ghasi Ram, I. L. R., 49 All. 812

CIVIL PROCEDURE CODE, SECTION 115. *See* Criminal Procedure Code, section 476 836

CIVIL PROCEDURE CODE, ORDER I, RULE 10(2)—*Mortgage—Partition of mortgaged property prior to preliminary decree—Parties added as defendants in application for final decree—Hindu law—Partition—Evidence of partition having taken place.*] Pending a suit for sale on a mortgage, the mortgaged property was partitioned, but the preliminary decree was passed as against one defendant only. When, however, the plaintiffs came to apply for the final decree, they joined certain other persons, upon the ground that by reason of the partition they had obtained possession of portions of the mortgaged property since the passing of the preliminary decree. But no formal application was made to add these persons as parties to the record.

Held, that it was not competent to the court to add (*per* ASHWORTH, J.), or at any rate the court should not have added (*per* IQBAL AHMAD, J.), the names of these persons to the array of parties, and their names should be struck off.

Held, also, by ASHWORTH, J., that the bringing of a suit for partition is only presumptive evidence of separation and that evidence may be rebutted by other evidence such as the fact of the withdrawal of the plaint on the ground that separation had not taken place or was not desired, but not by evidence merely of withdrawal of the plaint. *Palani Ammal* v. *Muthuvenkatachala Mooniyar*, I. L. R., 48 Mad., 284, referred to.

Shagun Chand v. Data Ram, I. L. R., 49 All. ... 664

CIVIL PROCEDURE CODE, ORDER II, RULE 2—*Mesne profits—Future mesne profits not claimed in original suit—Subsequent suit therefor barred.*] A court being competent to give a decree for future mesne profits to the date of obtaining possession, if a plaintiff omits to ask for them in his plaint, a subsequent suit for the same relief will be barred by order II, rule 2, of the Code of Civil Procedure. *Ram Din* v. *Bhup Singh*, I. L. R., 30 All., 235, *Kashi* v. *Bajrang Prasad*, I. L. R., 30 All., 86, and *Girwar Singh* v. *Ram Piari Kuer*, 78 Indian Cases, 826, followed.

Goswami Gordhan Lalji Maharaj v. Bishambar Nath, I. L. R., 49 All. 597

CIVIL PROCEDURE CODE, ORDER VI, RULE 17, *See* Act No. IX of 1872, section 63 599

CIVIL PROCEDURE CODE, ORDERS VI, VIII, X AND XIX. *See* Act No. XLV of 1860 492

CIVIL PROCEDURE CODE, ORDER VII, RULE 17. *See* Criminal Procedure Code, sections 476 and 476 898

CIVIL PROCEDURE CODE, ORDER XXI, RULES 22 AND 66—*Execution of decree—Death of judgement-debtor before issue of sale proclamation—Proclamation issued without bringing on record the judgement-debtor's legal representatives.*] Order XXI, rule 66, of the Code of Civil Procedure, expressly requires that the proclamation shall

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be drawn up after notice to the decree-holder and the judgement-debtor. It is imperative on the court to issue a notice to the judgement-debtor.

Where, therefore, the judgement-debtor has died before issue of such notice to him, and no representative is brought upon the record, proceedings in execution cannot be validly continued.

Raghunath Das v. *Sunder Das Khetri*, I. L. R., 42 Calc., 72, followed. *Sheo Prasad* v. *Hira Lal*, I. L. R., 12 All., 140, *Bhagwan Das* v. *Jugul Kishore*, I. L. R., 42 All., 570, *Doraiswami* v. *Chidambaram Pillai*, I. L. R., 47 Mad., 63, and *Ramgopala Aggar* v. *Ramanugacharia*, I. L. R., 47 Mad., 288, referred to.

Chandi Prasad v. Jamna, I. L. R., 49 All. . . 830

CIVIL PROCEDURE CODE, ORDER XXI, RULES 58 TO 63—*Attachment—Application by alleged mortgagee to have his mortgage notified—Dismissal of application—Suit by mortgagee—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article* 11.] A person who claimed to be the holder of a mortgage on some property which was the subject of an attachment, applied to the executing court and asked that his mortgage might be notified. The court, largely because the applicant gave it no assistance by supplying the necessary information, found that no mortgage was proved to exist, and dismissed the application.

Held, that rule 63 of order XXI of the Code of Civil Procedure applied and it became necessary for the applicant to sue within one year to establish his right as mortgagee. *Durga Prasad* v. *Manna Ram*, 1 A. L. J., 530, and *Ganesh Krishna* v. *Damoo*, I. L. R., 41 Bom., 61, dissented from. *Venkatarattnam* v. *Ranganayakamma*, I. L. R., 41 Mad., 965, and *Lakshmanan Chettiar* v. *Parasuran Pillai*, 37 M. L. J., 153, referred to.

Held, further (by ASHWORTH, J.), that headings to chapters of groups of sections—unlike marginal notes—can be looked at as a guide to the interpretation of the sections to which they relate.

Debi Das v. Maharaj Rup Chand, I. L. R., 49 All. . . 903

CIVIL PROCEDURE CODE, ORDER XXI, RULES 66 AND 90—*Execution of decree—Application by judgement-debtor to set aside sale on the ground of inaccuracy of the sale proclamation.*] *Held*, that it is not open to a judgement-debtor, when making an application under order XXI, rule 90, of the Code of Civil Procedure, to object to the sale proclamation upon the ground that certain material entries therein were incorrect, when he might have impugned its accuracy when notice was sent to him under rule 66 (2).

Mohan Lal v. Kali Charan, I. L. R., 49 All. . . 788

CIVIL PROCEDURE CODE, ORDER XXI, RULE 73—*Execution of decree—Sale—Persons barred from purchasing—Clerk to decree-holder's pleader.*] A clerk of a pleader of a decree-holder is not debarred by the terms of order XXI, rule 73, of the Code of Civil Procedure from purchasing property sold in execution of the decree. *Alagirsami* v. *Ramanathan*, I. L. R., 30 Mad., 111, referred to.

Rule 73 is intended to prohibit all those who have anything to do with the machinery of the sale having any interest, direct or indirect, in the result of the sale.

Shiam Lal v. Giraj Kishore, 49 All. 292

CIVIL PROCEDURE CODE, ORDER XXI, RULE 89—*Execution of decree—Application to set aside sale—Deposit of the amount by judgement-debtor and his mortgagee—Validity of.*] Certain judgement-debtors whose property had been sold in execution of a decree executed a mortgage of the property, and then the mortgagees and them-

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selves, by means of separate applications, paid into court the amount needed to get the sale set aside, one party tendering approximately two-thirds and the other one-third.

Held, that there was nothing illegal in payment being made in this way, the two payments should be treated as one and as being the payment of the judgement-debtors. *Sarai Begum* v. *Haider Shah*, 9 A. L. J., 12, distinguished.

Mathur Saran v. Bishambhar Nath, I. L. R., 49 All. . . 839

CIVIL PROCEDURE CODE, ORDER XXII, RULES 2 AND 3—*Pre-emption—Suit by several plaintiffs—Suit dismissed—Appeal—Death of a plaintiff pending appeal—Remand—Suit continued and decree passed ignoring the fact of the death of one plaintiff—Joinder of a "stranger" in the suit.*] Nine plaintiffs brought a suit for pre-emption. The suit was dismissed by the trial court. The plaintiffs appealed, and pending the appeal one of them died. No steps, however, were taken to bring upon the record any representative of the deceased plaintiff appellant. The appeal proceeded and resulted in an order remanding the suit to the court of first instance for re-trial. Again, the attention of the court was not drawn to the fact that one of the plaintiffs was dead and a decree was passed in favour of the whole nine of them. The eight original plaintiffs with the legal representatives of the deceased plaintiff then applied for execution, and were met with the objection that the decree having been passed in favour of one plaintiff who was dead at the time of its passing, was a nullity, and this objection was sustained.

Held, on appeal by the plaintiffs that, when the decree was passed in favour of the plaintiffs, it was a decree passed in favour of the eight pre-emptors and a person who must be deemed, by reason of the abatement of his appeal against the original dismissal of his suit, to have been a person without right, i.e., a stranger. The suit, therefore, ought in the circumstances to have been dismissed.

Mathar Singh v. Abhainandan Prasad, I. L. R., 49 All. 756

CIVIL PROCEDURE CODE, ORDER XXII, RULES 4 AND 10—*Mortgage—Death of judgement-debtor after passing of preliminary decree—No application for substitution within prescribed time.*] A preliminary decree in a mortgage suit was passed on the 15th of May, 1920. The judgement-debtor died in July, 1920. No application for substitution was made, but the decree-holder applied for a final decree on the 12th of May, 1923.

Held, that the application was in order. *Tulsiram* v. *Tulsiram*, 64 Indian Cases, 307, not followed. *Lakshmi Achi* v. *Subbarama Aiyar*, I. L. R., 39 Mad., 488, and *Dakuji Subharayudu* v. *Musti Rama Dasu*, 68 Indian Cases, 942, referred to.

Ali Bahadur Beg v. Rafi-ullah, I. L. R., 49 All. ... 310

CIVIL PROCEDURE CODE, ORDER XXXI, RULES 66 AND 90—*Execution of decree—Adjournment of sale—Necessity for publication of date and hour of adjourned sale.*] When a sale in execution of a decree has been adjourned it is essential that due notice of both the day and the hour of the adjourned sale shall be given to the public. The hour is only of slightly less importance than the day. *Mahabir Pershad* v. *Dhanukdhari Singh*, I. L. R., 31 Calc., 815 referred to.

Babu Ram v. Imam-ullah, I. L. R., 49 All. ... 402

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CIVIL PROCEDURE CODE, ORDER XXXII—*Guardian ad litem—Appointment of guardian after expiry of period of limitation—Pre-emption—Wajib ul-arz—Interpretation—Custom or contract.*] Under order XXXII of the Code of Civil Procedure it is the duty of the court, when it is brought to its notice that one of the defendants is a minor, to appoint a guardian, and the mere fact that the guardian may not be appointed until after the expiry of the period of limitation, would not be fatal to the suit. *Rup Chand* v. *Dasodha*, I. L. R., 30 All., 55, followed.

The material portion of a *wajib-ul-arz* dealing with the subject of pre-emption ran as follows :—

"In future, every co-sharer has a right to transfer the whole or a portion of his property. Up till now no pre-emption suit was instituted on behalf of any co-sharer . . . In future if any co-sharer likes to sell his property, he will at first sell it to his co-sharers," etc., etc., *Held*, that there was nothing in the language of the paragraph which militated against the existence of a custom and, therefore, plaintiff's suit must succeed.

Digumbu Singh v. *Ahmad Saeed Khan*, I. L. R., 37 All., 129, and *Shesharan Singh* v. *Kuisum-un-nisa*, I. L. R., 49 All., 267, followed.

Har Lal Singh v. Rudra Singh, I. L. R., 49 All. ... 869

CIVIL PROCEDURE CODE, ORDER XXXIV, RULE 4—*Mortgage—Compromise decree providing for payment of mortgage money in instalments—Application for a final decree not necessary.*] Where a compromise decree provides for the payment of mortgage money in instalments and does not provide for payment on a fix date within six months from the date of declaring the amount due, order XXXIV, rule 4, of the Code of Civil Procedure has no application to the case; and consequently it is unnecessary to apply for a final decree in the terms of order XXXIV, rule 5.

Jagannath Umar v. *Ram Karan Singh*, 20 A. L. J., 575, distinguished. *Bechu Singh* v. *Bichuram Singh*, 10 C. L. J., 91, and *Ishan Chandra Kundu* v. *Nitratan Adhikari*, (1923) A. I. R. (Pat.), 375, referred to.

Askari Husan v. Jahangir, I. L. R., 49 All. ... 207

CIVIL PROCEDURE CODE, ORDER XXXIV, RULE 6—*Mortgage—Decree for sale—Sale proceedings and mortgage subsequently declared void—Refund of money to auction-purchaser—Application for personal decree against mortgagor—Limitation.*] A plaintiff mortgagee obtained a decree for sale, in execution of which his claim was satisfied. The mortgagor's grandson, however, there-after obtained a decree declaring that both the mortgage and the decree and consequent sale were void as against him. The result was that the auction-purchaser applied for and obtained the return of his purchase-money. The mortgagee then applied under order XXXIV, rule 6, of the Code of Civil Procedure for a personal decree against his mortgagor.

Held, (1) that it was competent to the mortgagee to apply under order XXXIV, rule 6, and (2) that time began to run, not from the date of the decree setting aside the auction-sale, but from the time when the auction-purchaser recovered his money.

Pirbhu Narain Singh v. *Baldeo Misra*, I. L. R., 29 All., 260, distinguished. *Kedar Nath* v. *Chanda Mal*, I. L. R., 26 All., 24, *Ram Rachhibir* v. *Imami Begam*, 9 Indian Cases, 303, and *Sheo Din* v. *Bhawani Bakhsh*, 14 Oudh Cases, 92, referred to.

Badal Singh v. Debi Saran Dhar Dube, I. L. R., 49 All. 506

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CIVIL PROCEDURE CODE, ORDER XLI, RULE 33—*Usufructuary mortgage—Suit for declaration of payment—Finding of payment, but suit for declaration time-barred—Decree to be granted—Power of court to give relief to party who has not appealed.*] Plaintiff sued for a declaration that the money due in respect of certain property usufructuarily mortgaged by him had been paid off, and his suit was dismissed. He did not appeal, but some of the defendants did; and on this appeal it was found that the plaintiff's allegation of payment was correct, but that the remedy by means of a declaration was time-barred. The Court then took action under order XXXIV, rule 9 of the Code of Civil Procedure, and directed the defendants to retransfer the property in suit to the mortgagor plaintiff

Held with reference to *Ramam Lal* v. *Dhanda*, I. L. R., 34 All., 33, that the procedure adopted by the lower appellate court was right

Mahmud Hasan v. Lalta Ram, I. L. R., 49 All. ... 224

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPH 16, CLAUSE (1)—*Arbitration—Award—Appeal—Decree*] An award must be in conformity with clause (1) of paragraph 16 of schedule II of the Civil Procedure Code in order that a decree passed on it may be unappealable

Tursi v. *Bandeo*, 21 A. L. J., 705, followed. *Ibrahim Ali* v. *Mahvin Ali*, I. L. R., 38 All., 422, and *Najm-ul-din Ahmad* v. *Panch*, I. L. R., 20 All., 384, referred to

Sahdeo Singh v. Medni Singh, I. L. R., 49 All. ... 178

COMMITTING MAGISTRATE. Statements made before——, *See* Criminal Procedure Code, section 288 251

COMMITMENT, *See* Criminal Procedure Code, sections 207 and 215 ... 181

"COMMON GAMING HOUSE," *See* Act (Local) No. I of 1925, section 2 562

COMPANY—*Liquidation—Banker and customer—Question whether in certain circumstances a customer should rank as a secured or an unsecured creditor.*] One *JP* left some money with a bank and received a pass-book in which it was stated that the money was left on deposit. As a matter of fact, however, the practice was this: *JP* used to secure borrowers who would agree to pledge ornaments by way of security. The borrower was taken by *JP* to the manager of the bank or he would go to the manager with a note from *JP*. The ornaments were kept by the bank by way of security and money was advanced on interest at the rate of 12 per cent. per annum. Out of this interest *JP* used to get 9 per cent. and the bank 3 per cent. No money belonging to *JP* used to be lent by the bank except on security of ornaments. Similarly when a man came to redeem his ornaments, he would either take *JP* to the bank or take a note from him to the manager, and on payment the ornaments would be returned.

Held, that, in these circumstances, the bank having gone into liquidation, *JP* should rank as a secured creditor.

Allahabad Union Bank, Ltd. v. Jageshar Prasad Shukul, I. L. R., 49 All. 870

COMPANY *See* Principal and agent 820

COMPENSATION, *See* Act No. I of 1894, section 24, clause (3) ... 333

COMPENSATION, *See* Criminal Procedure Code, sections 107 and 250 ... 750

COMPLAINT, *See* Criminal Procedure Code, sections 195(1) (*b*) and (*c*) and 476 799

COMPLAINT, *See* Criminal Procedure Code, sections 476 and 195 (5) ... 752

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COMPOUNDING OFFENCE *See* Act No. XLV of 1860, section 341 ... 484

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COMPROMISE, *See* Act No. IX of 1872, section 23 540

COMPROMISE, *See* Act (Local) No. III of 1905, section 111 ... 873

COMPROMISE DECREE, *See* Act No. VII of 1913 728

COMPROMISE DECREE, *See* Civil Procedure Code, order XXXIV, rule 4 207

CONFESSION, *See* Act No. XLV of 1860, section 201 57

CONTRACT. *See* Act No. IX of 1872, sections 32 and 37 527

CONVICTION Alteration of, on appeal—*See* Criminal Procedure Code, sections 423, 237 and 238 120

CO-OPERATIVE SOCIETY, *See* Act No. II of 1912, section 42(4) (*a*) ... 701

CO-SHARER. Suit by—against tenant, *See* Act (Local) No. II of 1901, section 191 918

COURT FEE, *See* Act No. VII of 1870, section 7, clause (v), (*c*) ... 908

COVENANT running with the land *See* Act No. IX of 1872, sections 32 and 37 527

CREDITOR. *See* Company 876

CRIMINAL PROCEDURE. CODE, SECTIONS 52 AND 112—*Security for good behaviour—Order not setting forth the substance of the information received by the Magistrate—Illegality*]. Merely setting out in a notice under section 112 of the Code of Criminal Procedure that a man is an habitual thief or robber and having the prosecution witnesses ready there and then to go on with the case is not the procedure contemplated by the law. In such cases where the Magistrate does not record the substance of the information received, this is more than an irregularity and will vitiate any subsequent order that may be passed. *Emperor* v. *Rajkumar*, I. L. R., 42 All., 646, followed

Emperor v. Nihal, I. L. R., 49 All ... ...

CRIMINAL PROCEDURE CODE, SECTIONS 99A *to* 99G—*Act No. XLV of* 1860 *(Indian Penal Code), section* 153A—*Application to set aside order of forfeiture—Burden of proof—Intention of author of proscribed book*]. *Held*, that where an application is made under section 99B of the Code of Criminal Procedure to have an order of forfeiture set aside on the ground that the matter published does not fall within the mischief of section 153A of the Indian Penal Code, it is for the applicant to convince the Court that, for the reasons he gives, the order is a wrong order.

If the High Court is left in doubt, after hearing the application, it should set aside the order.

Held, also, that if the language of a book is of a nature calculated to produce or to promote feelings of enmity or hatred between two classes of His Majesty's subjects, the writer must be presumed to intend that which his act was likely to produce. *The King* v. *Burdett*, 4 B. and Ald., 95 (120), referred to.

A violently abusive and obscene diatribe against the founder or prophet of a religion or against a system of religion may amount to an attempt to stir up hatred or enmity against the persons who profess that religion.

Emperor v. Kali Charan Sharma, I. L. R., 49 All. ... 856

CRIMINAL PROCEDURE CODE SECTION 195, *See* Act No. XLV of 1860, section 193 131

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CRIMINAL PROCEDURE CODE, SECTIONS 107 AND 112—*Security for keeping the peace—Substance of information given in summons (if) instead of in order—Irregularity.*] A Magistrate taking proceedings under section 107 *et seq.* of the Code of Criminal Procedure, instead of sending a copy of his order with the summons, gave the substance of the information in the summons itself. *Held*, that the Magistrate failed to comply with the provisions of section 112, but the irregularity was covered by section 537 of the Code of Criminal Procedure as it was not shown that the accused had been prejudiced by it. *Emperor* v. *Suleman Adam*, 11 Bom. L. R., 740, referred to.

Persons who come to the High Court in revision against an order under section 107 of the Code of Criminal Procedure are expected to do so with the utmost promptitude and certainly within thirty days of the order against which they complain

Emperor v. Ram Dee Singh, I. L. R., 49 All. ... 236

CRIMINAL PROCEDURE CODE, SECTIONS 107 AND 250—*Security for keeping the peace—Compensation—Order for compensation not applicable.*] Section 250 of the Code of Criminal Procedure cannot be applied to proceedings under section 107 of the Code. *Ram Badan Singh* v. *Janki*, I. L. R., 45 All., 363, and *Emperor* v. *Ghasita*, I. L. R., 18 All., 109, followed.

Brij Nath v. Kali Charan, I. L. R., 49 All. 750

CRIMINAL PROCEDURE CODE, SECTION 109, CLAUSE (a)—*Security for good behaviour—"Person taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction."*] It is an entire mistake to read clause (a) of section 109 of the Code of Criminal Procedure as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes in the dark, or by a deserted road, or by some other secret means to commit a crime in his own neighbourhood. The offence contemplated is that of a person, probably, though not necessarily, coming from outside the jurisdiction into the Magistrate's jurisdiction for some nefarious purpose, and taking precautions to conceal the fact that he is present in that jurisdiction. *King-Emperor* v. *Sharif Ahmad*, 8 A. L. J., 1097, *Emperor* v. *Lallu*, 17 A. L. J., 891, and *Emperor* v. *Ghulam Jilani*, 17 A. L. J., 892, followed.

Emperor v. Bhairon, I. L. R., 49 All. 240

CRIMINAL PROCEDURE CODE, SECTION 109—*Interpretation of* "*Within the local limits of such Magistrate's jurisdiction*" *and* "*Satisfactory account of himself.*"] *Held*, on a construction of section 109 of the Code of Criminal Procedure, that (1) the words "within the local limits of such Magistrate's jurisdiction" as used in section 109 (*a*) are part of the predicate "to conceal his presence." *Emperor* v. *Bhairon*, I. L. R., 49 All., 240, followed.

(2) A person living within the territorial jurisdiction of a Magistrate trying the case, who takes steps to conceal that he is there, by removing himself from one part to another, may be within the section

(3) A man who is deliberately preparing to commit a burglary and when caught by the police admits his intention, is not, for this reason only, a person who "cannot give a satisfactory account of himself" within the meaning of the section.

The words "satisfactory account" as used in section 109 mean satisfactory in accordance with the known facts that are consistent with the surrounding circumstances.

Emperor v. Himayat-ullah, I. L. R., 49 All. 814

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CRIMINAL PROCEDURE CODE, SECTIONS 133, 137 AND 537—*Procedure prescribed by section 137 disregarded—Illegality.*] The provisions of section 137 of the Code of Criminal Procedure are imperative, and therefore where the opposite party has appeared and shown cause against an order passed by a Magistrate in proceedings under section 133 it is not competent to the Magistrate to accept an agreement by the parties interested and to pass orders merely on an inspection of the locality. The provisions of section 537 of the Code are applicable merely to errors of procedure arising out of mere inadvertence and not to substantive errors of law or to cases where there has been a disregard of the mandatory provisions of the Code *Ram Mandal* v. *Chandra Mandal*, 21 C. W. N., 926, followed.

Bhura v. Tara Singh, I. L. R., 49, All. 270

CRIMINAL PROCEDURE CODE, SECTIONS 133 AND 137—*Illegality—Magistrate's order made absolute on the strength merely of a tahsildar's report.*] It is not competent to a magistrate, in proceedings under sections 133 and 137 of the Code of Criminal Procedure, to make his order absolute on the mere report of the tahsildar, without going into evidence. *Hinga* v. *King-Emperor*, 6 A. L. J., 685, *Ismail* v. *Bunda*, 20 A. L. J., 657, and *Jassi* v. *Emperor*, 20 A. L. J., 602, followed.

Emperor v. Abdul Karim, I. L. R., 49 All. 488

CRIMINAL PROCEDURE CODE, SECTIONS 133, 137 (1), 537 (a), 539B—*Conditional order made absolute without recording evidence—Illegality—Local inspection—Memorandum of relevant facts observed at a local inspection to form part of the record.*] A Magistrate cannot make an order under section 133, Code of Criminal Procedure, absolute without recording evidence and simply on the basis of a local inspection made by him. *Ismail* v. *Bunda*, 20 A. L. J., 657, and *Ramchan Karmakar* v. *Emperor*, I. L. R., 44 Calc., 61, followed.

A local inspection by a Magistrate is only permitted by section 539B of the Code of Criminal Procedure, for the purpose of properly appreciating the evidence in the case and cannot take the place of evidence itself. *Ram Sahai Singh* v. *Dwarka Singh*, 61 Indian Cases, 712, followed.

Section 537 of the Code of Criminal Procedure applies only to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law. The section does not apply to cases of disregard of or disobedience to mandatory provisions of the Code. *Subrahmania Ayyar* v. *Emperor*, I. L. R., 25 Mad., 61, followed

Turkha v. Nanak, I. L. R., 49 All. 475

CRIMINAL PROCEDURE CODE, SECTION 145 (1)—*Effect of omission to record an order under clause* (1)—*Illegality—Proceedings vitiated.*] *Held*, that the failure of the Magistrate to comply with the provision of clause (1) of section 145 of the Code of Criminal Procedure will vitiate the entire proceedings held in the case.

Banka Singh v. Gokal, I. L. R., 49 All. 325

CRIMINAL PROCEDURE CODE, SECTIONS 195(1) (b) AND (c) AND 476—*Complaint made by a court—Competence of trial court not affected by the fact of the parties concerned having compromised in appeal—Act No. XII of 1887 (Revenue, Agra and Assam Civil Courts Act), sections 21(1) and 8.*] If it appears to a court that any of the offences enumerated in section 195 (1) (b) and (c) of the Code of Criminal Procedure have been committed "in or in relation to a proceeding in that court," it has jurisdiction to proceed under

section 476 of the Code. The mere fact that in the appellate court the parties agree to compromise the matter, or to get it decided by a reference to arbitration, or in accordance with the statement of a referee, cannot take away the jurisdiction vested in the trial court to make a complaint under section 476 of the Code of Criminal Procedure, provided that court is satisfied that "it is expedient in the interest of justice that such a complaint should be made."

The proceedings taken by a civil court under section 476 of the Code of Criminal Procedure are to be dealt as proceedings of a civil nature and are, therefore, governed by the rules relating to civil cases. By section 8 of the Civil Courts Act (XII of 1887) an Additional Judge is competent to discharge any of the functions of a District Judge which the District Judge may assign to him, and in the discharge of those functions the Additional Judge is competent to exercise the same powers as the District Judge.

Mutsuddi Lal v. *Mule Mal*, I. L. R., 31 All., 205, *Ram Chandra* v. *Jhan Rao*, I. L. R., 13 All., 169, and *Bauwanta Lal* v. *Bhaskar*, 24 B., L. J., 217, followed. *Ram Chandra Chandra Vithaldas* v. *Tarapada*, I. L. R., 39 Calc., 721, *Hari Mandal* v. *Keshab Chandra Dass*, I. L. R., 43 Calc., 37, and *Rajdhari Lal* v. *Ramsahai Lal*, I. L. R., 19 All., 451, referred to.

Emperor v. Narain Das, I. L. R., 49 All. 702

CRIMINAL PROCEDURE CODE, SECTION 195(1) (c). *See* Criminal Procedure Code, sections 476 and 478 898

CRIMINAL PROCEDURE CODE, SECTIONS 233 AND 234. *Charge—Several offences of a similar nature extending over a period of not more than one year joined together in one charge.*] The accused was charged with having, on or about a certain date, committed theft in respect of eight necklaces. The evidence, however, showed that he had committed criminal breach of trust in respect of two of the necklaces on different dates more than a year apart, and it was not clear as to when he had misappropriated the others.

Held, that, although there was technically no misjoinder of charges, the trial was vitiated in the same way as if there had been a misjoinder of charges and the case was not a mere irregularity. *Subrahmania Ayyar* v. *King Emperor*, I. L. R., 27 Mad., 61, and *Emperor* v. *Kalka Prasad*, I. L. R., 7 All., 42, referred to.

Emperor v. Raman Lal, I. L. R., 49 All. 319

CRIMINAL PROCEDURE CODE, SECTIONS 233 AND 312. *See* Criminal Procedure Code, sections 485, 488 and 439 881

CRIMINAL PROCEDURE CODE, SECTION 256. *Failure to comply with the provisions of—Irregularity in procedure.*] The provisions in section 256, Code of Criminal Procedure, are not provisions relating to the mode of trial, and failure to follow these provisions strictly amounts to no more than an irregularity in procedure, and would not be a ground for setting aside the conviction, unless the irregularity had occasioned a failure of justice.

Subrahmania Ayyar v. *King Emperor*, referred to.

Emperor v. Chajju, I. L. R., 49 All. 916

CRIMINAL PROCEDURE CODE, SECTIONS 263 AND 264. *Summary trial—Notes of evidence by Magistrate not necessarily part of the record.*] In cases in which sections 262 and 264 of the Code of Criminal Procedure are applicable, the Magistrate is perfectly free to take such notes as he pleases, or, if he prefers, to take none at all, and whether he takes them or whether he does not, whatever notes he makes are his private property which he can

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treat exactly as he pleases. *Satish Chandra Mitra* v. *Manmatha Nath Mitra*, I. L. R., 18 Calc., 269, dissented from.

Emperor v. Mantu Tewari, I. L. R., 49 All. ... 261

CRIMINAL PROCEDURE CODE, SECTION 241, *See* Act (Local) No. I of 1925, section 2 562

CRIMINAL PROCEDURE CODE, SECTION 288—*Evidence—Statements before Committing Magistrate now admissible "for all purposes."*] Under section 288 of the new Code of Criminal Procedure, statements made before a Committing Magistrate, when admissible under the Indian Evidence Act, can be admitted "for all purposes" and not only for the purpose of corroboration or contradiction. The use of the expression "for all purposes" was clearly intended to remove the previous conflict of opinion and the words "subject to the provisions of the Indian Evidence Act, 1872," mean nothing more than that such statements should not contain matters which would be irrelevant or inadmissible under that Act. *Queen-Empress* v. *Dan Sahai*, I. L. R., 7 All., 893, *Queen Empress* v. *Nirmal Das*, I. L. R., 22 All., 435, *Emperor* v. *Dwarka Kurmi*, I. L. R., 28 All., 683, and *King-Emperor* v. *Jakal Teli*, I. L. R., 3 Pat., 761, referred to.

Emperor v. Bihari, I. L. R., 49 All. 251

CRIMINAL PROCEDURE CODE, SECTION 267—*Charge to jury—Misdirection—Appeal.*] An Assistant Sessions Judge in trying a case under section 377 of the Indian Penal Code with a jury, when he came to sum up, apparently did not give a summary of the evidence, but only told the jury that there were discrepancies in the evidence, without pointing out what those discrepancies were. Further, the Judge in charging the jury more than once used the expression: "If you are morally convinced, your verdict should be that of guilty."

Held, that this amounted to a misdirection, and that the conviction should be set aside.

Emperor v. Enayat Husain, I. L. R., 49 All. ... 269

CRIMINAL PROCEDURE CODE, SECTIONS 237 AND 215—*Pardon—Competence of Magistrate to grant pardon not affected by postponement of case—Commitment—Power to quash—Act No. I of 1872 (Indian Evidence Act), section 133—Accomplice.*] The fact that a criminal case may be temporarily postponed does not in any way affect the power of the Magistrate in charge of it to grant a pardon to the accused under section 337 of the Code of Criminal Procedure. *Kishori Gir* v. *Ram Narayan Gir*, 8 C. W. N., 77, referred to.

Under section 215 of the Code of Criminal Procedure, it is only on a question of law that the High Court is justified in quashing a commitment.

The real test, in deciding as to whether there is evidence which could fairly be acted upon, is whether a Judge at a trial held with the aid of jurymen could say that there was no evidence which could go before a jury. *Jhabal Kurmi* v. *Emperor*, 1 A. L. J., 110, *Akbar Ali* v. *Bela Bahadur*, 21 A. L. J., 133, and *Lachman* v. *Jwala*, I. L. R., 5 All., 161, referred to.

Emperor v. Bal Chand, I. L. R., 49 All. 191

CRIMINAL PROCEDURE CODE, SECTION 345 (1) *See* Act No. XLV of 1860, section 347 484

CRIMINAL PROCEDURE CODE, SECTIONS 423, 237 AND 238—*Charge for principal offence and conviction for abetment—Powers of appellate court to alter conviction.*] It is not open to a court to find

a mere guilty of abetment of an offence on a charge of the offence itself. The only section under which an appellate court can alter the finding and base a conviction for abetment is section 423 of the Code of Criminal Procedure. But this section must be read with sections 237 and 238 of the Code. Abetment not being a "minor offence," section 238 will not apply, and it can only come under section 237 if there is an element in the abetment which is not included in the charge.

Reg. v. Chand Nur and Pirbhu Adamji, 11 Bom. H. C. R., 240, followed. *Yeditha Subbaya v. Emperor*, 25 M. L. J., 722, referred to.

Emperor v. Mahabir Prasad, I. L. R., 39 All. ... 120

CRIMINAL PROCEDURE CODE, SECTIONS 435, 436 AND 476. *Order of discharge by Magistrate—Competence of Sessions Judge to revise order at the instance of a private person.*] *Held*, that a Sessions Judge is empowered under section 435 of the Code of Criminal Procedure to call for the record of an order of discharge passed by a Magistrate in a case instituted under section 476, and, if he is dissatisfied with the correctness, legality or propriety of the finding, to order a further inquiry under section 436, and there is nothing to prevent a Sessions Judge from exercising this jurisdiction at the instance of a private person. *Empress v. Chotu*, Weekly Notes, 1886, p. 281, referred to.

Piari Lal v. Sagar Mal, I. L. R., 39 All. 230

CRIMINAL PROCEDURE CODE, SECTIONS 435, 438 AND 439. *Revision—Sessions Judge making a reference on the merits—Criminal Procedure Code, sections 253 and 302—Examination of accused—Accused examined at wrong stage of trial—Irregularity.*] A Sessions Judge sitting in revision should not make a reference to the High Court if his only objection to the finding of the court below is based on the merits, unless it is very clear that the conviction is wrong and there can be no reasonable doubt of the matter.

Where a magistrate examines an accused at a wrong stage in the trial, this is not an illegality which will necessarily vitiate his proceedings, but it will only affect them if the fact that the examination of the accused was taken at the wrong time has occasioned a failure of justice.

Mitarjit Singh v. King-Emperor, 6 Pat. L. J., 641, and *Varma Rowther v. King-Emperor*, I. L. R., 46 Mad., 149, referred to.

Emperor v. Subhman, I. L. R., 39 All. 561

CRIMINAL PROCEDURE CODE, SECTION 437. *Revision—Order of discharge set aside by Sessions Judge—Reference to High Court by District Magistrate against order of the Sessions Judge.*] On a case sent up by the police under section 304 and other sections of the Indian Penal Code, the magistrate concerned, without deciding judicially that the charge was groundless, and that the evidence did not establish any case, altered the charge under section 304 to one under section 304A and then proceeded to dismiss the case.

The complainant applied in revision to the Sessions Judge, who entertained the application under section 437 of the Code of Criminal Procedure and decided that the Magistrate had not acted according to law and that the case ought to be committed to the sessions under section 304 of the Indian Penal Code.

The District Magistrate thereupon passed an order purporting to be a reference of the case to the High Court and asked

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the Sessions Judge to forward it. On the Sessions Judge refusing to do so, the District Magistrate sent up a reference to the High Court directly.

Held, that the District Magistrate had in the circumstances no authority to refer the case to the High Court

Fatta v. *Fatta*, I. L. R., 26 All., 561, and *Dharan Singh* v. *Jobi Prasad*, I. L. R., 37 All., 355, referred to

Emperor v. Allah Mahr, I. L. R., 49 All. ... 443

CRIMINAL PROCEDURE CODE, section 437—*Discharge—Further inquiry—Circumstances in which the power to order further inquiry should not be exercised.*] Sessions Judges and Magistrates should, in a case where a man has been discharged, use the powers given to them by section 437 of the Criminal Procedure Code sparingly and with great caution and circumspection, especially in cases where the questions involved are mere matters of fact. Where the order of discharge is one which cannot be said to be either perverse or *prima facie* incorrect and there is no suggestion that any further the evidence is forthcoming, no further inquiry should be directed under section 437 of the Code. *Queen-Empress* v. *Chotu*, I. L. R., 9 All., 52, and *Bindeori Dube* v. *Emperor*, 18 A. L. J., 1135, followed.

Emperor v. Alam, I. L. R., 49 All. 873

CRIMINAL PROCEDURE CODE, SECTION 456. *See* Civil Procedure Code, section 2. 469

CRIMINAL PROCEDURE CODE, SECTION 476—*Civil Procedure Code, section 115—Order in appeal directing prosecution—Revision—Jurisdiction.*] An appellate order passed under section 476B of the Code of Criminal Procedure is open to revision on the civil side and not on the criminal side of the High Court, the alterations in section 476 introduced by the Criminal Procedure Code (Amendment) Act, 1923, not having affected the arguments or the decision in the case of *In the matter of the petition of Bhup Kunwar*, I. L. R., 26 All., 249.

And this being so, the High Court, under section 115 of the Code of Civil Procedure, cannot interfere with a case where a Judge may have decided to prosecute on wrong or insufficient grounds. *Banwari Lal* v. *Jhanku*, 21 A. L. J., 317, referred to.

Abdul Hug v. Shee Ram, I. L. R., 49 All. ... 836

CRIMINAL PROCEDURE CODE, SECTIONS 476 AND 195(5)—*Procedure—Complaint—Order by District Magistrate for the withdrawal of a complaint of an offence under section 211 of the Indian Penal Code made by a special magistrate.*] Under section 476 of the Code of Criminal Procedure as it now stands a court must make a complaint and cannot directly order prosecution. That complaint must set forth the offence, the precise facts on which it is based and the evidence available for proving it.

A District Magistrate cannot order the withdrawal of a complaint made by a court under section 476 of the Code of Criminal Procedure, in respect of an offence falling under section 211 of the Penal Code as such a complaint is not referred to in section 195(5) of the Code of Criminal Procedure, which gives the Magistrate the power of withdrawal.

Emperor v. Ram Prasad, I. L. R., 49 All. 752

CRIMINAL PROCEDURE CODE, SECTIONS 476 AND 478—*Order of Civil Court committing accused to Court of Session—Criminal Procedure Code, section 195 (1) (c)—"Produced"—Civil Procedure Code, order VII, rule 17.*] *Held*, (1) that a civil court, after sending

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proceedings under section 176 of the Code of Criminal Procedure and then acting under section 178 is in no way debarred from committing a person who seems to have committed an offence before it to the Court of Session, by reason of the fact that no appeal has been made against such an order, but that a document, e.g., an account book, is made the less "production" before a court, within the meaning of section 195 (c), because it is brought into court for the purpose of verifying an extract therefrom made in the plaint according to the provisions of order VII, rule 17, of the Code of Civil Procedure.

Emperor v. Rameshwar Lal, I. L. R., 39 All. ... 898

CRIMINAL PROCEDURE CODE, SECTION 435, CLAUSE (2)—*Jurisdiction*—"*Resided.*"] A stay of two months in a temporary place of residence with occasional visits during that period to the permanent place of residence can be regarded as amounting to a "residence" within the meaning of section 176 of the Code of Criminal Procedure.

The expression "resided" in clause (2) of this section includes a temporary residence and is not to be confined to permanent residence.

Ramdin v. *Dhanni Lal*, 1920 A. L. R., 1919, 305, and *Fitzevers* v. *Fitzevers*, I. L. R., 22 All., 204, distinguished.

Sher Singh v. Amar Kunwar, I. L. R., 49 All ... 179

CRIMINAL PROCEDURE CODE, SECTION 499 *Surety for not having produced accused at a place other than that mentioned in the bond*—*Accused in consequence absconding*—*Forfeiture of the bond.*] According to the terms of a bond the surety was responsible for the production of the accused to the Fatehpur magistrate's court at Agra. But as several cases were pending against the accused, the District Magistrate directed the surety to produce the accused in a court at Fatehpur. The surety endeavoured to carry out this order but the accused absconded on the way to Fatehpur. Subsequently the surety was ordered to produce the accused at Agra and, as he was unable to do so, his security money was forfeited. *Held*, that the order forfeiting the bond was correct, but having regard to all the circumstances of the case, the ends of justice would be served by reducing the sum forfeited from Rs. 1,000 to Rs. 200.

Shamsuddin Sirkar v. *Emperor*, I. L. R., 30 Calc., 107, and *Behari Lal Chatterjee* v. *Emperor*, I. L. R., 36 Calc., 749, referred to.

It is the duty of a surety to see that an accused does not run away, but where a surety has failed to produce the accused by reason of an illegal order passed by a Magistrate, which the surety was not bound to carry out, and where there is no connivance and negligence, it cannot be said that the surety has acted irresponsibly.

Emperor v. Parbhu Dayal, I. L. R., 49 All. ... 845

CRIMINAL PROCEDURE CODE, SECTION 526—*Transfer*—*Act (United No. VI of 1920 (United Provinces Village Panchayats Act*—*Power of High Court to transfer a criminal case pending before a panchayat.*] The High Court has power to transfer a criminal case pending before a panchayat constituted under Local Act No. VI. of 1920. *Sat Narain* v. *Surju*, I. L. R., 46 All., 197, and *Emperor* v. *Kanhapati*, I. L. R., 48 All., 25, referred to.

Badeo Misra v. Badri Misra, I. L. R., 49 All ... 188

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CRIMINAL PROCEDURE CODE, SECTION 561A.—*Bail. Inherent powers of High Court in the case of an applicant whose appeal is pending in the Privy Council.*] A High Court has inherent jurisdiction to stay the execution of its own order when the ends of justice require it. It can, e.g., admit to bail a convicted person whose appeal has been admitted by the Privy Council.

King-Emperor v. *Durga Cowal*, I. R., 1908, No. 15, and *Queen Empress* v. *Subrahmania Ayyar*, I. L. R., 21 Mad., 161, referred to.

Emperor *v.* Ram Sarup, I. L. R., 49 All. 947

CRIMINAL PROCEDURE CODE, SECTION 561A.—*Inherent powers.*] *High Court. Power to direct expungement of objectionable remarks from judgment of a subordinate court.*] The inherent power of a High Court referred to in section 561A of the Code of Criminal Procedure must be deemed to include a power to order the deletion from the record of a subordinate court of passages which are either irrelevant or inadmissible and which adversely affect the character of persons before the court. Such jurisdiction, however, can only be exercised when there is no foundation whatsoever for the remark objected to and not where it is a matter of inference from evidence.

Emperor v. *Thomas Pellaka*, 14 Indian Cases, 633, *Mal Kuar* v. *Kin Lal Gir*, 11 Indian Cases, 1000, *Emperor* v. *C. Dunn*, I. L. R., 44 All., 401, and *Mohammad Qasim* v. *Jowahir Khan*, (1926) A. I. R. (Lahore), 382, referred to

Panchanan Banerji *v.* Upendra Nath Bhattacharji, I. L. R., 49 All. 284

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EXECUTION OF DECREE. *See* Civil Procedure Code, order XXI, rule 79 899

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HIGH COURT Inherent powers of——, *See* Criminal Procedure Code, section 561A 247, 254

HINDU LAW—*Widow Surrender by widow in favour of next reversioner—Effect of surrender on alienations previously made—mortgage.*] Where a Hindu widow completely surrenders her widow's estate in favour of the next reversioner, the effect of the surrender is not to give the reversioner an immediate right to challenge alienations previously made by her; but the right to do so remains in abeyance until the death of the widow.

Rungasami Gounden v. *Nachiappa Gounden*, I. L. R. 12 Mad., 633, *Rohan Lal* v. *Madho Lal Ahir Gujarat*, I. L. R., 19 Calc. 236, *Sega Chidambaranna* v. *Satchli Buvaragamma*, M. W. N., 1915, 577, *Sreeramulu* v. *Krishnama*, I. L. R., 26 Mad., 118, *Singaram Chettiar* v. *Kaliyanasundaram Pillai*, M. W. N., 1914, 735, *Ramakrishna* v. *Tripurbai*, I. L. R., 33 Bom., 88, *Sahadeo Singh* v. *Ramanandan Singh*, 4 A. L. J., 261, *Lachhmi nath Sastri* v. *Sunthri Ammal*, I. L. R., 41 Mad., 75, and *Prafulla Kamini Roy* v. *Bhabani Nath Roy*, I. L. R., 32 Calc., 1018, referred to.

Lachhmi Chandi v. Lachhu, I. L. R., 49 All. 826

HINDU LAW—*Hindu widow—Will—Widow given an absolute estate by the will of her deceased husband—Subsequent adoption—Adoption subject to provisions of will.*] A childless Hindu, the owner of property which had come to him by partition with the adoptive father, made a will leaving everything to his wife. The will provided that "she should be absolute owner of his entire estate, the adopted boy having no power of interference during her lifetime." The widow, in exercise of a power of adoption conferred on her by this will, adopted a son. The deed of adoption stated that the adopted boy "shall be heir to the estate left by my husband and myself." At the date of the adoption the widow was a minor and there were no indications of any

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intention on her part to divest herself of the estate. *Held*, that the will of the husband prevailed, and the adopted son had no right to possession of the estate so long as his adoptive mother was alive.

Lakshmi v. *Subramanya*, I. L. R., 12 Mad., 399, followed, and *Vinayak Narayan Joag* v. *Govindrao Chintaman Joag*, 6 Bom. H. C. R., 224, *Narayanaswami* v. *Ramaswami*, I. L. R., 11 Mad., 172, *Ganapati Ayyan* v. *Sarathi Ammal*, I. L. R., 21 Mad., 10, *Visalakshi Ammal* v. *Sivaramayya*, I. L. R., 27 Mad., 577, and *Venkatanarasimma Rao* v. *Subba Rao*, I. L. R., 46 Mad., 360, referred to.

Durgi *v.* Kanhaiya Lal, I. L. R., 49 All. 879

HINDU LAW—*Hindu widow—Alienation by widow—Question as to origin of widow's title—Adverse possession.*] On the death of one *ST*, *N*, who was the widow of a predeceased nephew of his, got possession of some of his property and remained in possession for more than twelve years. The widow and one of two grandsons having alienated some of this property, the other grandson sued to have the sale set aside.

Held, that *N* had acquired a title which was good not only against the reversioners to *ST*, but as against the reversioners to her husband's estate.

Lajwanti v. *Safa Chand*, I. L. R., 5 Lah., 193, distinguished. *Varada Pillai* v. *Jeevaratnammal*, I. L. R., 43 Mad., 244, and *Kali Charan* v. *Piari*, I. L. R., 46 All., 763, referred to.

Rikhdeo Tiwari v. Sukhdeo Tiwari, I. L. R., 49 All. ... 713

HINDU LAW—*Deed of gift in favour of widows—Interpretation of document—Nature of interest conveyed—Stridhan—Suit by reversioners—Burden of proof as to nearness.*] It is incumbent on a plaintiff seeking to succeed to property as a reversioner to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the court that to the best of his knowledge there are no nearer heirs. He cannot be expected to do anything more, and it is for those who claim that their kinship is nearer than that of the plaintiff to prove that relationship. *Rama Rau* v. *Kuttiya Goundan*, I. L. R., 40 Mad., 651, followed.

One *SR*, about a year before his death, executed a deed of gift by which he divided a certain village between his two wives, giving one-quarter to the senior wife and three-quarters to the junior wife. After *SR*'s death the widows took possession of the village and divided it between them, but not in the proportions set forth in the deed of gift. Thereafter the senior widow is said to have given her share to her daughter's son. The junior widow was succeeded as to her share by her daughter and then by her daughter's daughter, *J*. In *J*'s lifetime the reversioners to *SR* sued for possession and obtained a decree. *J* appealed, but died pending the appeal, and her sons were brought on the record in her place.

In appeal: the original deed of gift being construed as in the first court as conveying only a life interest, it was *held* that the plaintiffs were entitled to succeed. But even if the gift had been absolute, as matters stood when the appeal came on for hearing, *J* being dead and having left no female heir, the plaintiffs would still be entitled to their decree. *Shea Shankar Lal* v. *Data Sahai*, I. L. R., 25 All., 268, *Shea Partab Bahadur Singh* v. *The Bhagbad Bank*, I. L. R., 25 All., 476, *Subramanian Chetty* v. *Arunachelam Chetti*, I. L. R., 28 Mad., 1, *Sham Bihari Lal* v.

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Ram Kali, I. L. R., 45 All., 715, and *Ram Kali* v. *Gopal Dei*, I. L. R., 48 All., 648, referred to.

Javitri v. Gendan Singh, I. L. R., 49 All. ... 779

HINDU LAW—*Hindu widow—Alienations by widow—Right of suit by remote reversioners during lifetime of nearer reversioners.*] If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the most presumable reversioner would be entitled to sue. In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit. *Ram Lochan Kunwar* v. *The Court of Wards*, I. L. R., 6 Calc., 701, followed.

But where the plaintiff sues as next reversioner, it is not proper to read into the plaint an allegation that those who are barring the suit as distant reversioners have or are the nearer reversioners. Those other precluded themselves from bringing the suit or have refused to do so. *Megha Rai* v. *Ram Khelawan*, I. L. R., 35 All., 426, and *Jhanda* v. *Tara*, I. L. R., 45 All., 15, referred to.

Sita Saran v. Jagat, I. L. R., 49 All. 815

HINDU LAW—*Joint Hindu family Mortgage—Previous mortgage renewed in favour of same mortgagee—Previous debt set off in subsequent deed—"Antecedent debt".*] Where a previous mortgage deed of joint family property is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one, the alienation can be deemed to be in lieu of an "antecedent debt" so as to be binding on the sons, unless they can establish immorality or illegality.

Whenever a previous debt is set off in a subsequent mortgage deed, the true test to apply, in order to ascertain the antecedency of the debt, is whether the first debt was independent of the second. The two transactions must be distinct in time as well as in fact. *Braj Narain* v. *Mangal Prasad*, I. L. R., 46 All., 95, *Surajbansi Koer* v. *Sheo Persad Singh*, I. L. R., 5 Calc., 148 (171), *Muddun Thakoor* v. *Kantoo Lall*, I. L. A., 253, *Nanomi Babooain* v. *Modhun Mohun*, 13 C. W. N., 21 (25), *Badri Prasad* v. *Madan Lal*, I. L. R., 15 All., 75 (80), *Chandrika Singh* v. *Mata Prasad*, I. L. R., 31 All., 176 (198), *Sahu Ram Chandra* v. *Bhup Singh*, I. L. R., 29 All., 447 (449), *Chet Ram* v. *Ram Singh*, I. L. R., 44 All., 388, *Ganga Shankar Singh* v. *Sheonandan Misra*, I. L. R., 46 All., 384, and *Lal Bahadur* v. *Ambika Prasad*, I. L. R., 47 All., 795, referred to.

Ram Rekha Singh v. Ganga Prasad Mukarabdhuraj, I. L. R., 49 All. 128

HINDU LAW—*Joint family property—Alienation—Necessity—Purchaser making due inquiry—Proof of application of price.*] A sale of joint property should not be set aside merely because part of the proceeds, which is not a small part, is not proved to have been applied to purposes of necessity. The real question to be considered is whether the sale itself was justified by necessity; if the purchaser has acted honestly and made due inquiry as to the existence of necessity, he is not bound to account for the application of the price.

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In a suit to set aside a sale of joint family property, it was proved that the purchaser had made due inquiry as to the necessity for the sale, that Rs 3,000 out of the price of Rs 3,500 had been applied to purposes of necessity, and that the price was adequate. The High Court made a decree setting aside the sale conditionally upon Rs. 3,000 being repaid to the purchaser

Held, that the decree was contrary to principle and authority, and that the suit should be dismissed

A decree upholding a sale conditionally upon the purchaser paying a small part of the price not proved to have been applied to purposes of necessity is also contrary to authority.

Hunoomanparsaud's Case, 6 Moo., I. A., 393, followed. *Girdharee Lall* v. *Kantoo Lall*, L. R., 1 I. A., 321, discussed. *Gobind Singh* v. *Baldeo Singh*, I. L. R., 25 All., 390, *Ram Dei Kunwar* v. *Ab. Jafar*, I. L. R., 27 All., 494, *Dwarka Ram* v. *Jhulsi Pande*, I. L. R., 45 All., 429, and *Daulat* v. *Sankatha Prasad*, I. L. R., 47 All., 365, disapproved

Judgement of the High Court reversed.

Sri Krishan Das v. Nathu Ram, I. L. R., 49 All. ... 149

HINDU LAW—*Joint property—Partition by will executed by head of joint family—Consent of members necessary—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 127—Article not applicable after partition—Adverse possession.*] Even the head of a joint Hindu family has no right to make a partition by will of joint property among the various members of the family except with their consent. *Brijraj Singh* v. *Sheodan Singh*, I. L. R., 35 All., 337 (346), followed.

Article 127 of the first schedule to the Indian Limitation Act, 1908, presupposes the existence of a joint family and the exclusion of a co-parcener from his joint family property. *Bishesher Tewari* v. *Bisheshar Dayal*, 15, Ondh Cases, 111, and *Ramoo Tewary* v. *Doona Tewary*, I. L. R., 24 Calc., 309 (314), followed.

The exclusive possession of one co-sharer even though combined with the non-payment of profits cannot amount to a clear adverse possession unless there has been an ouster of the other co-parceners to their knowledge and openly. *Burns* v. *Bryan*, 12 App. Cas., 184 (192), followed.

Harkesh Singh v. Hardevi, I. L. R., 49 All. ... 768

HINDU LAW—*Effect of migration on the personal law of a Hindu—Custom—Mode of proof of—Compilation made by a Government servant at the instance of the Government—Act No. I of 1872 (Indian Evidence Act), sections 35 and 57—Kumaun.*] A court would be justified in assuming *prima facie* that the law applicable to a Hindu is that prevailing among his caste-fellows in the locality, unless he specifically denies that this is so and sets up the case that he has migrated from another part of India and continues to follow the law which prevailed in his original place of domicile.

An officer of the Indian Civil Service was deputed by the Local Government to inquire into and collect the customs that were prevailing in Kumaun. The officer did so, and wrote a report which was published under the authority of the Government.

Held, that a court administering civil law in Kumaun was justified in accepting this report as *prima facie* evidence of the customary law applicable to Kumaun and in throwing upon the party who disputed the existence of a custom therein set forth the

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burden of proving that no such custom existed and that the ordinary Hindu law applied.

Tota Ram Sah v. Shyam Lal Sah, I. L. R., 49 All. ... 848

HINDU LAW—*Mitakshara—Mayukha—Adoption of orphan—Custom.*] The Hindu law being a personal law, the presumption is that a Hindu who migrates to another part of India where the law differs from that of his domicile of origin carries with him the law of his domicile of origin, unless there is evidence of an intention to adopt the law of his new domicile.

According to the law of the Mitakshara an orphan cannot be validly adopted.

In the present case, a custom to the contrary having been set up as prevailing in the Gwalior State, it was *held*, that the custom, if it could be established, appeared rarely to operate, and in short was the principal subject of investigation in the case, and that the recognition of the adopted son by the ruling chief and certain rules framed by the authorities of the State

Dharnidhar Jahagirdar v. *Sona Bai*, 23 A. L. J., 373, and *Ramkishore* v. *Jamnadevi*, I. L. R., 13 Cal., 129, referred to.

Sukhbir Singh v. Mahraj Kuar, I. L. R., 49 All. ... 396

HINDU LAW, *See* Civil Procedure Code, order I, rule 10(2) ... 104

HINDU WIDOW, *See* Act No. XV of 1856, section 2 203

HINDU WIDOW, *See* Act (Local) No. XI of 1921, sections 19 and 20 ... 490

HINDU WIDOW, *See* Hindu law 341

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ILLEGAL CONFESSION, *See* Act No. IX of 1860, section 47 (*c*) ... 331

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"INHERENT POWERS," *See* Criminal Procedure Code, section 561A 247, 254

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INSOLVENCY, *See* Act No. V of 1920, sections 4 and 53 71

INSOLVENCY, *See* Act No. V of 1920, section 6, clause (*g*) 321

INSOLVENCY, *See* Act No. V of 1920, sections 27, 28, 31 and 41 ... 201

INSOLVENCY, *See* Pre-emption 307

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INTEREST, *See* Act No. IX of 1872, sections 7, 8 and 9 674

INTERPRETATION OF STATUTES, *See* Act No. IV of 1882, section 59 ... 95

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JOINT FAMILY PROPERTY, *See* Hindu law 119

JURISDICTION—*British-India Courts—Foreigners temporarily resident in British India not exempt from the jurisdiction.* The Code of Civil Procedure extends to the whole of British India and there is no limitation in it or in any other Act in force in India excepting foreigners from the jurisdiction of Indian Courts. *Curdyal Singh v. Raja of Faridkot*, I. L. R., 22 Calc., 222, referred to.

Smith v. The Indian Textile Company, I. L. R., 49 All. 687

JURISDICTION, *See* Act No. IX of 1887, section 16 646

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MARRIAGE, *See* Muhammadan law 557

MESNE PROFITS, *See* Act No. No. IX of 1908, schedule I, article 109 ... 666

MESNE PROFITS, *See* Civil Procedure Code, order II, rule 2 ... 697

MINOR—*Bond executed by a minor—Attempted ratification after attainment of majority.*] A person who has executed a bond whilst a minor cannot, when he attains majority, by executing a second bond of similar purport, ratify or confirm the former bond.

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Indran Ramaswami Pandia Thalavar v. *Anthappa Chettiar*, 16 M. L. J., 422, and *Arumugam Chetti* v. *Duraisinga Tevar*, I. L. R., 37 Mad., 38, followed. *Kundan Bibi* v. *Sree Narayan*, 11 C. W. N., 135, dissented from. *Gregson* v. *Raja Sri Sri Aditya Deb*, L. R., 16 I. A., 221, distinguished.

Bindeshri Bakhsh Singh v. Chandika Prasad, I. L. R., 40 All. 187

MINOR, *See* Act No. IX of 1872, section 68 58

MINOR, *See* Muhammadan law 557

MISDIRECTION, *See* Criminal Procedure Code, section 237 ... 209

MISJOINDER, *See* Criminal Procedure Code, sections 234 and 233 ... 313

MITAKSHARA, *See* Hindu law 305

MORTGAGE—*Suit by prior mortgagee—Decretal amount paid off by sale of one of the properties mortgaged—Subsequent suit on second mortgage—Purchaser held entitled to set up the first mortgage as a shield.*] *S* executed two mortgages, one on the 9th of May, 1904, in favour of *RS*, and the other on the 12th of May, 1915, in favour of *MS*. In 1916, *RS* brought a suit for sale on his mortgage, and impleaded therein the second mortgagee as well as the mortgagor. The plaintiff obtained a decree, and the properties mortgaged were put up for sale. The mortgagor, however, by selling one of the mortgaged villages, paid off the decretal amount. In the deed of sale it was expressly stated that the executants were paying off the first mortgage—that of 1904—and that the purchaser was to have the property free from all incumbrances.

Held, on suit by the second mortgagee on the mortgage of 1915, that the purchaser was entitled to set up the first mortgage as a shield against the second mortgagee's claim.

Dinobandhu Shaw Chowdhry v. *Jogmaya Dasi*, I. L. R., 29 Calc., 154, followed.

Madho Singh v. Pancham Singh, I. L. R., 40 All. ... 233

MORTGAGE—*Prior and subsequent incumbrances—Mortgage executed to satisfy prior mortgage—Question whether prior mortgage was kept alive beyond the period of limitation natural to it.*] On the 15th of March, 1898, eight villages were mortgaged to *B* by way of simple mortgage for a period of three years. On the 1st of November, 1898, the same villages were mortgaged to *A*. On the 4th of May, 1900, two of the eight villages (R and K) were again mortgaged to *B*, this time by way of usufructuary mortgage. Under this mortgage the mortgagee was entitled to sue for the amount due to him on dispossession and in that case he was entitled also to recover from the property hypothecated by the first mortgage. *B* was dispossessed of the village K on the 24th of February, 1911. Meanwhile he had purchased in 1904 the village R, but, as the result of a suit brought by the second mortgagee *A*, in 1909, that village was again sold and was purchased by *A*.

Held, on suit by *B* to enforce the first mortgage by sale of certain villages, that the suit was barred by limitation. If that mortgage was kept alive by the mortgage of May, 1900, it was not given a second birth, and if the plaintiff retained a right to sue on the simple mortgage of March, 1898, at all, they could do so only in accordance with the rule of limitation applicable to that bond.

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Mahomed Ibrahim Hossain Khan v. *Indoka Pershad*, I. L. R., 31 Calc., 527, and *Deputy Commissioner of Lucknow* v. *Pandi Sukhnandan*, 17 Oudh Cases, 38, referred to

Angarea Kunwar v. Ram Padarath, I. L. R., 19 All. ... 430

MORTGAGE—*Usufructuary mortgage—Lease by mortgagee to mortgagor—Suit by mortgagee for arrears of rent—Bes pukrafa—Civil Procedure Code, section* 11.] A usufructuary mortgagee can undoubtedly lease the mortgaged property to a third party, and there is equally no reason why he should not lease it to the mortgagor. If he does so and thereafter sues the mortgagor for rent and obtains a decree, that decree will be a *res judicata* as to the subsistence of the relation of landlord and tenant between the parties. *Bagheln* v. *Mathura Prasad*, I. L. R., 4 All., 430, and *Altaf Ali Khan* v. *Lalta Prasad*, I. L. R., 19 All., 496, distinguished.

Karamat Ali Khan v. Ganeshi Lal, I. L. R., 49 All. ... 638

MORTGAGE—*Suit for sale—Preliminary decree—Objection as to amount due on mortgage not competent after passing of the preliminary decree—New ground of appeal added after period of limitation—Such ground not entertainable.*] An objection that the amount due on a mortgage ought to be reduced should be put forward at the time the preliminary decree is passed. At the time of the preparation of the final decree the amount fixed in the preliminary decree cannot be altered except for some reason or some event which may have happened subsequent to the preliminary decree. *Imam Ali* v. *Baij Nath Ram Sahu*, I. L. R., 33 Calc., 613, distinguished.

A plea raised in a ground of appeal added at a date when it is time-barred, although the addition was made with the permission of the court and without any objection on the ground of limitation being raised by the other party, cannot be argued.

Mutlu Lal v. Deejji, I. L. R., 49 All. 809

MORTGAGE—*Suit for sale—Omission of mortgagee to implead transferee of part of the mortgaged property—Subsequent suit against such transferee barred.*] If a mortgagee sues on his mortgage and neglects to implead a transferee of part of the mortgaged property, he cannot, after limitation has expired, bring a separate suit against the transferee so omitted, calling upon him to redeem the mortgage. *Harya Lal Singh* v. *Govind Rai*, I. L. R., 19 All., 511, followed.

Banwari Lal v. Nand Ram, I. L. R., 49 All. ... 923

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MORTGAGE, *See* Civil Procedure Code, section 47; order XXI, rule 100 379

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MORTGAGE, *See* Civil Procedure Code, order XLI, rule 23 ... 224

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MORTGAGE. *See* Hindu law 334

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MOSQUE, *See* Muhammadan law 806

MOTOR VEHICLE, *See* Act No. VIII of 1914, section 8 764

MUHAMMADAN LAW—*Dower—Liability of father of minor son who gives his consent to the marriage.*] A Muhammadan father does not, by simply giving his consent to the marriage of his minor son, without making himself a surety for the payment thereof, become liable for the payment of his daughter-in-law's dower.

Muhammad Siddiq v. Shahabuddin, I. L. R., 49 All. ... 557

MUHAMMADAN LAW—*Gift of undivided share of joint property—Donor not in possession at time of making it—Musha.*"] A Muhammadan father, who was not in possession at the time, made a gift of an undivided share of joint property to his daughter, but he did all that was possible for him to do to put his daughter in the same position in which he himself was, and he and his daughter subsequently jointly sued the other co-owners of the property and obtained a decree. *Held*, that the gift was not invalid for want of the donor's possession, or by the doctrine of *musha*; and in the circumstances of the case the doctrine of *musha* did not apply, as the donor had ostensibly sold the property first at a fixed price and then absolved the debtor of the debt which was the price. *Mohamed Buksh Khan* v. *Hosseini Bibi*, I. L. R., 16 Calc., 684, *Mahibullah* v. *Abdul Khalik*, I. L. R., 20 All., 230, and *Sheikh Muhammad Mumtaz Ahmad* v. *Zubaida Jan*, I. L. R., 16 I. A., 205, referred to.

Ahmadi Begam v. Abdul Aziz, I. L. R., 49 All ... 809

MUHAMMADAN LAW *Guardian and minor Rights of father as natural guardian—Act No. VIII of 1890 (Guardians and Wards Act), sections 12 and 25.*] By the Muhammadan law the father is the natural lawful guardian of his minor child, until by some order of a competent court he is deprived of his rights as such, and is automatically entitled to exercise the rights of a guardian without any order of a court appointing him.

The expression "guardian" used in section 25 of the Guardians and Wards Act, 1890, is not confined to statutory guardians, but includes the lawful guardian, such as the father, and the custody referred to in that section includes both constructive as well as actual custody. *Mushal Hussain* v. *Mohammad Jamal*, 21 Oudh Cases, 191, and *Annie Besant* v. *Narayaniah*, I. L. R., 34 Mad., 807, followed.

Ulfat Bibi v. Bafati, I. L. R., 49 All. ... 772

MUHAMMADAN LAW—*Pre-emption—First demand followed promptly by a second, in presence of witnesses and vendees, but witnesses not asked to bear testimony—Demand held valid.*] In a suit for pre-emption, under the Muhammadan law, the plaintiff made the first demand, as required by law, in the presence of two witnesses, and asked them to accompany him to the vendees in order that the second demand might be made in their presence. They both stated that they heard the second demand being made and their attention was attracted to it.

Held, that the omission on the part of the plaintiff to ask the witnesses in express terms to bear testimony was not fatal. *Ganga Prasad* v. *Ajudhia Prasad*, I. L. R., 28 All., 94, and

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Sadiq Ali v. *Abdul Baqi Khan*, I. L. R., 45 All., 290, distinguished.

Ahmad Hakim v. Muhammad Hikmat-ul'ah, I. L. R., 49 All. 885

MUHAMMADAN LAW—*Pre-emption*—Talab-i-ishtishhad—*Second demand made to one only of several vendees—Previous notice of date of sale—Pre-emption of share of one of several vendees.*] *Held*, in a suit for pre-emption based on the Muhammadan law—(1) that the mere fact of a previous notice to the plaintiff pre-emptor that the property is going to be sold on a certain date cannot operate as an estoppel or deprive him of his right to claim pre-emption after the sale has actually taken place; (2) that when the sale is to several vendees jointly, the pre-emptor is not obliged to pre-empt the whole, but can pre-empt the share of any one of the vendees; (3) that if the first demand is made to all the vendees, but the second to one only, the plaintiff can only get a decree in respect of the share of that one vendee.

Alimar Begam v. *Ali Husain*, I. L. R., 45 All., 449, *Gunput Jha* v. *Anund Singh Das*, S. D. A. (Lower Provinces), 22, and *Birj Bekaree Singh* v. *Durbaree Lal*, S. D. A. (Bengal), 585, referred to.

Muhammad Askari v. Rahmat-ullah, I. L. R., 49 All. ... 716

MUHAMMADAN LAW—*Shias—Will—Death of legatee in lifetime of testator—Legacy—Consent of heirs.*] According to the Shia law a testator can leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs; but where it exceeds one-third, it is not valid without the consent of all the heirs. Such consent may be given either before or after the death of the testator. If a legacy is not adeemed by the testator, the death of the legatee does not cause a lapse, but the legacy descends to the legatee's heirs.

Fazula Khanum v. *Jafar Khanum*, I. L. R., 20 All., 179, referred to.

Husaini Begam v. Muhammad Mehdi, I. L. R., 49 All. 547

MUHAMMADAN LAW—*Waqf—Waqf created in favour of mosque—Interest reserved to waqif during lifetime.*] Two Muhammadans (husband and wife) of the Hanafi sect made a *waqf* of a house in favour of a mosque which was managed by *panches*. In doing so, however, they reserved to themselves the right to live in the house until the death of the survivor.

Held that, according to the Muhammadan law, the *waqf* was invalid.

Muhammad Azmat-ullah Ahmad Khan v. *The Legal Remembrancer to Government, North-Western Provinces and Oudh*, I. L. R., 15 All., 321, followed. *Abdul Kadir* v. *Salima*, I. L. R., 8 All., 149, and *Bikani Mia* v. *Sakh Lal Poddar*, I. L. R., 20 Calc., 116, referred to.

Muhammad Shafi v. Muhammad Aziz, I. L. R., 49 All. 990

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PLEADINGS, *See* Act No. I of 1872, section 45 79

PLEADINGS, *See* Act No. I of 1872, section 99 66

POSSESSORY TITLE, *See* Act No. I of 1877, section 9 191

PRE-EMPTION—*Suit to recover property based partly on a claim to ownership and partly on an alleged right of pre-emption—Admission by party to suit—Effect of.*] It is not a valid objection to a suit for recovery of possession of immovable property that the claim is based partly on a right of pre-emption and partly on the allegation that some of the property in suit was the plaintiff's own property which had been wrongfully sold by the defendant vendor: *Sahadra Bibi* v. *Ramchandra Singh*, I. L. R., 37 All., 529, *Bhagwati Saran Mal Tewari* v. *Parmeshwar Das*, I. L. R., 36 All., 470, applied; *Iqbal Haidar Khan* v. *Mussamat Wasi Fatima Bibi*, I. L. R., 45 All., 53, distinguished.

An admission made by a party in the course of a suit is conclusive as against that party for the purposes of that suit

Abdul Aziz v. Mariam Bibi, I. L. R., 49 All ... 219

PRE-EMPTION—*Insolvency—Custom of pre-emption—Wajib ularz—Sale by Official Assignee—Provincial Insolvency Act (III of 1907), section 16, sub-section 2(a).*] When a share in a village in which a custom of pre-emption exists has vested in the Official Assignee under the Provincial Insolvency Act, 1907, section 16, a sale by him is subject to the custom. An Official Assignee takes the property of an insolvent exactly as it stood in his person, with all its advantages and all its burdens.

The record in a wajib-ul-arz of a custom of pre-emption is sufficient to establish the custom without oral evidence in confirmation. *Digambar Singh* v. *Ahmad Syed Khan*, I. L. R., 37 All., 129, followed.

A right of pre-emption recorded in a wajib-ul-arz is to be presumed to be recorded as a customary right, not as arising out of a contract between the co-sharers, or as being merely their wish or intention unless the language clearly shows the contrary. It is only a right by custom which should be recorded: *Ratnaji Pubaji* v. *Pahlwan Bhagat*, I. L. R., 33 All., 196, approved.

Whether a person entitled to pre-empt loses or does not lose his right if he attends an auction sale of the property, and does not bid, he does not lose his right if the auction is of the property together with arrears of rent, all in one lot.

Decree of the High Court, I. L. R., 402, reversed. Sheobaran Singh v. Kulsum-un-nissa, I. L. R., 10 All. 367

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PRE-EMPTION—*Two suits by rival pre-emptors standing on same footing—Transfer of property in suit by the vendee to one of the two pre-emptors*—Lis pendens.] Inasmuch as the doctrine of *lis pendens* applies to a suit for pre-emption, it is not possible for a defendant vendee to give preference to one of two pre-emptors with equal claims, each of whom has brought a suit for pre-emption, by selling the subject-matter of the suit to him to the exclusion of the rival pre-emptor. *Mangal v. Sahib Ram*, I. L. R., 27 All., 544, distinguished. *Ramta Prasad v. Ram Jag*, I. L. R., 36 All., 60, referred to.

Bhagwan Sahai v. Nanak Chand, I. L. R., 40 All. ... 536

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PRINCIPAL AND AGENT—*Common agent of two companies—Money of one company used by the agent for the benefit of the other—Liability to refund—Limitation—"Money lent and received."*] Two companies, neither of whom did any regular business in the way of lending money, were managed by the same agents. From time to time sums of money belonging to the better-off of the two companies were used in the business of the other. Both companies went into liquidation and the liquidator of the company which had, so to speak, lent the money called upon the liquidator of the other company for re-payment. The claim was repudiated as time-barred.

Held, that the fact that the managing agents of the two companies were common to both would not exempt the company which had had the use of the other's money from liability to refund; but the period of limitation would be three years from the date of each actual payment, and, in view of the fact that this period had already run when the debtor company went into liquidation, the claim was barred by time.

Upper India Rice Mills, Ltd. v. The Jamuna Sugar Factory, Ltd., I. L. R., 40 All. 530

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REGULATIONS—Reg25—XI (1825) AND DIPLOMAS (*custom determining boundary of estates divided by a river*. Dhanbhoom *Sudden or gradual accretion.*] If it is satisfactorily proved that the custom of *dhanbhoom* subsists as between the owners of contiguous estates divided by a river, it is no reason for not applying the custom that in a particular instance it may seem to press hardly on one side or the other, e.g., on account of a very considerable or sudden change in the course of the stream. *Inzer Singh* v. *Mirza Shurfooddeen*, I N W P., H C R., 224, and *Shakrat Singh* v. *Ghulam Rasul* 18 A L J., 195, referred to.

Gulab Rai v. Girwar Singh, I. L. R., 49 All ... 195

RELIGIOUS ENDOWMENT—*Power of mutawallis to nominate successor —Death of both without making appointment—Suit by author of trust for declaration of his right to appoint—Civil Procedure Code, section 92—Act No. I of 1877 (Specific Relief Act) section 42.*] Under the terms of a deed of endowment two *mutawallis* were appointed, and it was provided that each of the two had the power to appoint his own successor as *mutawalli* or a successor to the other in the event of his dying without making an appointment. Ultimately both *mutawallis* died without appointing any successors.

Held, that it was competent to the legal representative of the founder of the trust to sue to have it declared that the right of appointment had devolved upon himself, and that neither section 92 of the Code of Civil Procedure nor section 42 of the Specific Relief Act, 1877, was a bar to the suit.

Deokali Koer v. *Kadar Nath*, I. L. R., 30 Calc., 704, distinguished.

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Trade-mark—*Injunction of right to, by user—Infringement of —Remedy—Injunction—Damages—Act No. 1 of 1872 (Indian Evidence Act), section 15.*] Where a manufacture has been for some time in the habit of marking goods made by him with a particular trade-mark or set of marks, so that goods bearing such marks will be coming to be regarded as those of his manufacture by anyone wishing to purchase goods of the kind made by him, he may acquire by user a right to the exclusive use of such mark or marks and an action will lie against anyone who sells goods not manufactured by him bearing such marks or marks which are so similar thereto that they would probably induce people of the class which generally purchases goods of such a kind to believe that they were of his manufacture.	

The question of the similarity of the fraudulent mark to the true mark is not one of evidence but is a question for the Court to decide.

The principles on which damages in the case of an infringement of a trade-mark should be assessed discussed

Seixo v. *Provezende*, L. R., 1 Ch., 192, *Leather Cloth Company* v. *American Leather Cloth Company*, 11 H. L. C., 523, *Payton & Co., Ltd.* v. *Snelling Lampard & Co.*, A. C., 308, *Rockwell* v. *Crabb*, 36 L. J., Ch., 504, *Singer Manufacturing Co* v. *Loog*, L. R., 8 A. C., 15, *Board & Son* v. *Bagnall*, 2 A. C., 382, and *Birmingham Vinegar Brewery Co., Ltd.* v. *Powell*, A. C., 710, referred to.

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